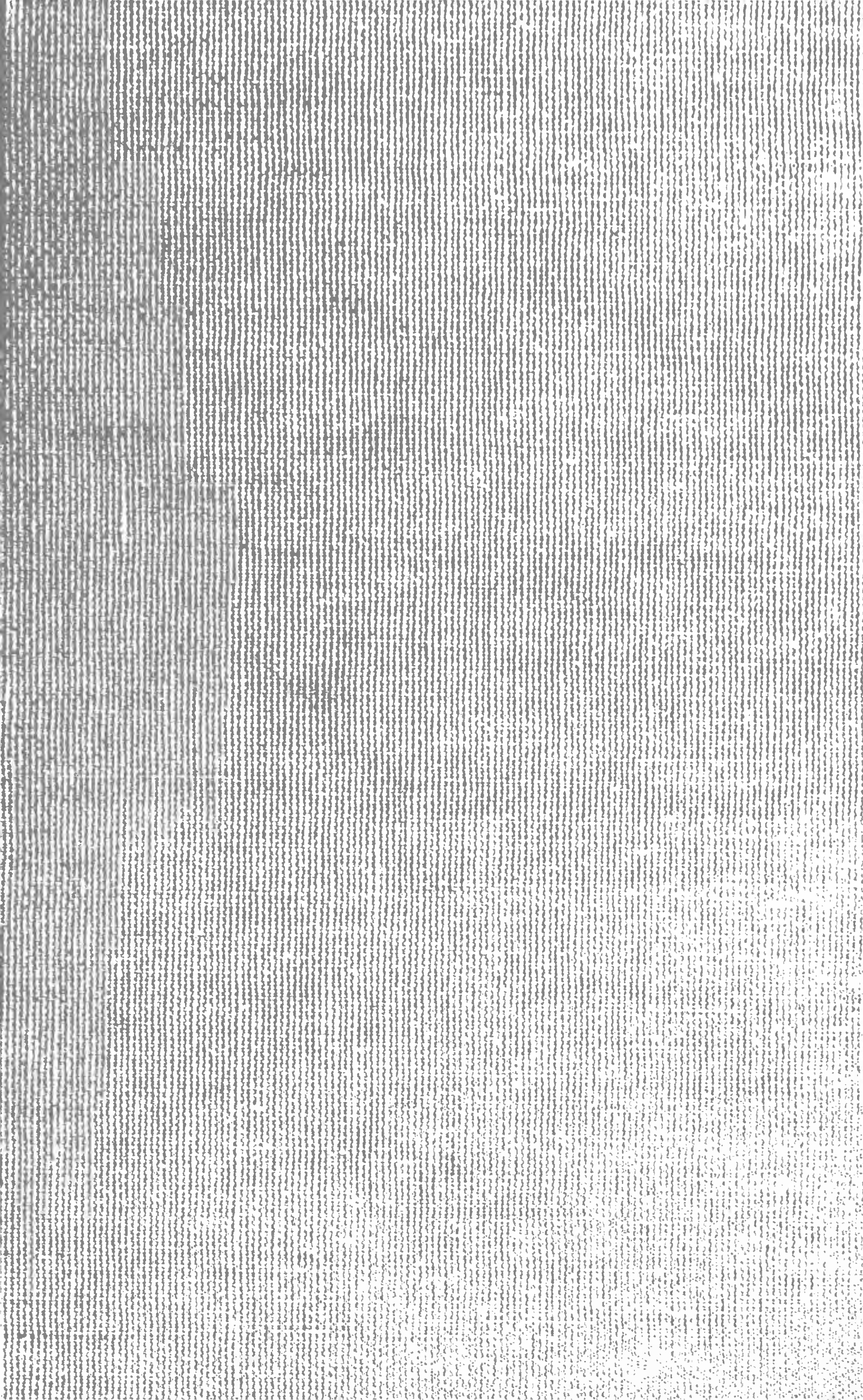

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No. 12716

United States Court of Appeals

for the Ninth Circuit.

SECURITIES AND EXCHANGE COMMISSION,
Appellant,

vs.

WILLIAM J. COGAN,
Appellee.

WILLIAM J. COGAN,
Appellant,

vs.

SECURITIES AND EXCHANGE COMMISSION, MARKET STREET RAILWAY COMPANY, STANDARD GAS AND ELECTRIC COMPANY and STANDARD POWER AND LIGHT CORPORATION,
Appellees.

CHARLES T. JONES,
Appellant,

vs.

SECURITIES AND EXCHANGE COMMISSION, MARKET STREET RAILWAY COMPANY, STANDARD GAS AND ELECTRIC COMPANY and STANDARD POWER AND LIGHT CORPORATION,
Appellees.

Transcript of Record

FILED

Appeals from the United States District Court, Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 12716

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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United States Court of Appeals
for the Ninth Circuit

No. 12716

SECURITIES AND EXCHANGE COMMISSION,

Appellant,

vs.

WILLIAM J. COGAN,

Appellee.

STATEMENT BY APPELLANT, SECURITIES AND EXCHANGE COMMISSION OF POINTS RELIED UPON ON APPEAL AND DESIGNATION OF RECORD TO BE PRINTED

(Pursuant to Rule 19 paragraph 6 of Rules of the Circuit Court for the Ninth Circuit)

I.

Securities and Exchange Commission, appellant herein for its Statement of Points to be relied upon by it on appeal, hereby adopts "Appellant's Statement of Points" filed by said appellant with the District Court on September 11, 1950, which said "Appellant's Statement of Points" is a part of the record on appeal herein, and is designated as Item 28 of the record by the Clerk of this Court.

II.

The Securities and Exchange Commission, ap-

pellant herein, hereby designates the following portions of the record, proceedings, and evidence to be printed on appeal herein:

1. Item 1 of the record on appeal herein, being the application of the Securities and Exchange Commission dated May 3, 1950, for an order of the District Court approving and enforcing and carrying out the Amended Plan for the recapitalization of Market Street Railway Company, and the following exhibits annexed to, and made part of, said application:

Exhibit E. Plan for Recapitalization of Market Street Railway Company, dated April 22, 1948.

Exhibit G. Findings and Opinion of the Securities and Exchange Commission dated September 30, 1949, with respect to said Plan for Recapitalization.

Exhibit H. Amended Plan for Liquidation and Dissolution of Market Street Railway Company, dated December 8, 1949.

Exhibit J. Supplemental Findings and Opinion of the Securities and Exchange Commission in respect of said Amended Plan, dated March 9, 1950.

Exhibit L. Amendment No. 1 to the Amended Plan for Liquidation and Dissolution of Market Street Railway Company, dated May 3, 1950.

Exhibit M. Order Approving Plan Under Section 11(e), dated May 3, 1950.

2. Item 8 of the record on appeal herein, being the Statement of Objections of Charles T. Jones to the application of the Securities and Exchange Commission for enforcement of the Amended Plan, specifically the following paragraphs in said Statement of Objections: Numbers 1, 2, 3, 29, 30, 34, 36, 37, 39, 40, 41, 45, prefatory paragraph preceding paragraph 54, and paragraphs 54, and 57.

* * *

6. Item 20 of the record on appeal herein, being Order of the District Court dated July 11, 1950.

7. Item 22 of the record on appeal herein, being Notice of Appeal filed by the Securities and Exchange Commission, Appellant, in the District Court on August 7, 1950, appealing from portions of the Order of the District Court dated July 11, 1950.
Order of the District Court dated July 11, 1950.
Also notices of appeal by Cogan & Jones.

8. Item 28 of the record on appeal herein, being Statement of Points filed by the Securities and Exchange Commission, Appellant.

9. Item 27 of the record on appeal herein, being Designation of Record on Appeal filed by the Securities and Exchange Commisison, Appellant.

Appellant further reserves the right to designate other portions of the record, proceedings, and evidence to be printed on appeal if such be deemed

necessary by reason of the filing of any counter designation or any objection to this designation.

Dated: November 21, 1950.

/s/ ROGER S. FOSTER,
General Counsel.

/s/ MYRON S. ISAACS,
Special Counsel, Division of Public Utilities.

/s/ ARTHUR E. PENNEKAMP,
Attorneys for the Appellant, Securities and Exchange Commission.

Certificate of Service

The undersigned, attorney for Appellant, Securities and Exchange Commission, hereby certifies that he has served a copy of the foregoing "Statement by Appellant, Securities and Exchange Commission of Points Relied upon on Appeal and Designation of Record to be Printed" on Respondent and Cross-Appellants herein on November 27th, 1950, by depositing copies thereof in the United States mails, in franked envelopes requiring no postage, addressed respectively to: William J. Cogan, 150 Broadway, New York 7, New York (pro se and attorney for Charles T. Jones) and M. Mitchell Bourquin and John E. Lynch, 620 Market Street, San

Francisco 4, California (attorneys for William J. Cogan and Charles T. Jones).

Dated this 27th day of November, 1950.

/s/ ARTHUR E. PENNEKAMP,
Attorney for the Appellant, Securities and Exchange Commission.

[Endorsed]: Filed November 28, 1950, U.S.C.A.

District Court of the United States, Northern District of California, Southern Division

Civil Action File No. 29723

In the Matter of
MARKET STREET RAILWAY COMPANY

A PROCEEDING TO ENFORCE A PLAN PURSUANT TO SECTIONS 11(e) AND 18(f) OF THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935

To the Honorable the Judges of the District Court of the United States for the Northern District of California, Southern Division

The Securities and Exchange Commission by its attorneys, Myron S. Isaacs, Howard S. Guttmann, and Arthur Pennekamp, respectfully states:

1. The applicant, Securities and Exchange Commission (the "Commission"), is an agency and instrumentality of the United States created by and

organized pursuant to Section 4 of the Securities Exchange Act of 1934, being Title I of an Act of Congress approved June 6, 1934, 48 Stat. 885, 15 U.S.C. Section 78d.

2. This application is made pursuant to the authority vested in the Commission and the jurisdiction vested in this Court by Sections 11(e), 18(f), and 25 of the Public Utility Holding Company Act of 1935 (the "Act"), being Title I of an Act of Congress approved August 26, 1935, 49 Stat. 803, 15 U.S.C. Sections 79a, et seq.

3. Market Street Railway Company ("Market Street") is a corporation organized under the laws of the State of California with its principal place of business in the City and County of San Francisco, State of California, and is a subsidiary company of Standard Gas and Electric Company ("Standard Gas") and of Standard Power and Light Corporation ("Standard Power"), within the meaning of Section 2(a)(8)(A) of the Act. It was engaged in the business of operating a street railway transportation system until the year 1944, when it sold its major physical assets to the City and County of San Francisco, California.

4. Standard Gas and Standard Power are corporations organized under the laws of the State of Delaware and are holding companies as defined in Section 2(a)(7)(A) of the Act, and having filed notifications of registration under Section 5(a) of the Act, are registered holding companies thereunder. Standard Gas is a subsidiary company of

Standard Power within the meaning of Section 2(a)(8)(A) of the Act.

5. As of September 30, 1949, Market Street had total assets of approximately $3,200,000, of which over $3,000,000 consisted of cash and United States Government securities. Market Street carried on its books an open account debt to Standard Gas in the amount of $1,026,249, including interest at 4 per cent per annum on $707,189 thereof from October 24, 1939. The claim of Standard Gas on the open account amounted to approximately $1,186,000, including interest at 6 per cent per annum on daily balances. The claim of Standard Gas is based upon its original agreement with Market Street; the amount on Market Street's books is based upon an order of the California Railroad Commission directing the reduction of interest charges. There were then pending against Market Street tort claims aggregating approximately $944,000. Market Street has no income other than interest which is substantially less than its expenses.

6. Market Street has outstanding 116,185 shares of Prior Preference 6% Cumulative Stock ("prior preference stock"), all publicly held, with a total preference in liquidation, including dividend arrears to September 30, 1949, of over $30,000,000. It also has outstanding 49,868½ shares of Preferred 6% Cumulative Stock, 46,737 shares of Second Preferred 6% Stock (non-cumulative), and 106,474 shares of Common Stock, all junior to the prior preference stock. Each share of each class is en-

titled to one vote per share. The prior preference stockholders have approximately 36 per cent of the voting power; Standard Gas, holding a majority of each of the junior classes of stock, has approximately 40 per cent of the voting power; and scattered holders of the junior stocks have approximately 24 per cent of the voting power.

7. On August 8, 1941, the Commission issued its Findings and Opinion and Order pursuant to Section 11(b)(1) of the Act requiring, among other things, that Standard Gas dispose of its interests in Market Street. A copy of said Findings and Opinion and Order (Holding Company Act Release No. 2929) is annexed hereto as Exhibit "A" and incorporated herein by reference. Said Order was not appealed from, has long since ceased to be subject to judicial review, and has become final. Standard Power does not directly hold any securities of Market Street.

8. On January 27, 1947, Standard Gas instituted an action against Market Street in this Court (Civil Action File No. 26807-R), seeking judgment for $1,069,063.30, with interest at 6 per cent per annum thereon from December 31, 1946, based upon the open account indebtedness of Market Street to Standard Gas. Thereafter Market Street filed an answer admitting indebtedness to Standard Gas in the amount of $948,439.01, with interest at 4 per cent per annum on $707,189.24 thereof from December 31, 1946. Lea Rosen, a holder of prior preference stock of Market Street, was thereafter granted

leave to intervene in said action on her own behalf and on behalf of other owners of prior preference stock, and filed an answer denying that Market Street was indebted to Standard Gas in any amount.

9. On May 20, 1947, the Commission, acting upon a petition and supplemental petition filed with it on behalf of a committee for prior preference stockholders of Market Street (the "Van Kirk Committee") by William J. Cogan, and upon an examination by its Division of Public Utilities of data in its files relating to Market Street and Standard Gas, issued a Notice and Order pursuant to Sections 11(a), 18(a), and 18(b) of the Act. Said Notice and Order directed that a public hearing be held to inquire into and receive evidence concerning the relationships, past and present, between Market Street and its associate companies and affiliates, the character of the interests of Standard Gas in Market Street, and the facts and circumstances concerning charges for services made against Market Street by affiliated companies; said Notice and Order also prohibited any payment by Market Street to or for the account of Standard Gas until the expiration of 60 days following the hearing. Said Notice and Order was published as Holding Company Act Release No. 7425, a copy of which is annexed hereto as Exhibit "B" and incorporated herein by reference. Thereafter the Commission held public hearings pursuant to said Notice and Order. Standard Gas filed a motion to dismiss the petition of the Van Kirk Committee and vacate the order of May 20, 1947, or, in the alternative, for a stay of the

proceedings. The Commission heard oral argument on the motion and, on August 1, 1947, entered a Memorandum Opinion and Order denying it in all respects. Said Memorandum Opinion and Order was published as Holding Company Act Release No. 7609, a copy of which is annexed hereto as Exhibit "C" and incorporated herein by reference. Standard Gas filed a petition to review the Order, and a motion to stay the proceedings before the Commission, with the Court of Appeals for the Third Circuit (No. 9481, October Term, 1946). On August 6, 1947, the Court of Appeals denied the motion of Standard Gas, and, on January 26, 1948, the appeal was dismissed pursuant to stipulation.

10. On August 21, 1947, the Commission entered an Order extending its prohibition against payments by Market Street to Standard Gas until the expiration of 60 days following the closing of the record in the proceeding. Said Order was published as Holding Company Act Release No. 7664, a copy of which is annexed hereto as Exhibit "D" and incorporated herein by reference. The Commission held further hearings during the year 1947 at which testimony was taken and documentary evidence adduced with respect to the relationships and transactions between Market Street, on the one hand, and Standard Gas and its affiliates, past and present, on the other. During the same period negotiations for a settlement of the claim of Standard Gas against Market Street were had between counsel for Rosen and representatives of Standard Gas, and between Cogan and representatives of Standard Gas. As a

condition to any settlement, Cogan demanded that he be paid a fee in the amount of $50,000 and that the Van Kirk Committee be paid a fee in the amount of $25,000. Early in December, 1947, Cogan and Standard Gas agreed to a settlement of the claim of Standard Gas against Market Street, subject to the approval of the Commission and of this Court, pursuant to which Market Street would pay $550,000 to Standard Gas, Market Street and Standard Gas would each pay $25,000 to Cogan and $12,500 to the Van Kirk Committee, Market Street would reimburse the Van Kirk Committee for its expenses up to $5,000, Standard Gas would vote its stock in Market Street for the election of nominees of the Van Kirk Committee as a majority of the directors of Market Street, and Standard Gas, Market Street, and Cogan would request the Commission to terminate its investigation and dissolve its prohibition against payments by Market Street to Standard Gas. Standard Gas announced the terms of the proposed settlement at a Commission hearing held on December 9, 1947.

11. On December 29, 1947, a motion was filed on behalf of Rosen, in the case then pending in this Court, to take proof with respect to the fairness and adequacy of the settlement or to order reference of the matter to a master. On January 12, 1948, Cogan wrote to request the Commission to oppose said motion. On January 15, 1948, Market Street and Standard Gas filed with the Commission a petition asking it to approve the settlement and to vacate the order prohibiting payments by Market

Street to Standard Gas. On March 11, 1948, Market Street and Standard Gas, supported by an affidavit of Cogan, filed with this Court a petition for an order approving settlement. On March 15, 1948, a hearing was held in this Court, before Judge Roche, on said petition and on the Rosen motion, at which Cogan appeared as well as counsel for Market Street, Standard Gas, Rosen, and the Commission. Counsel for the Commission advised the Court of the Commission's willingness to have the matter decided either by this Court or by the Commission, as the Court might prefer. Judge Roche decided that the matter should be referred back to the Commission, and pursuant to his suggestion, upon oral stipulation of all parties, the matter was dropped from the calendar of the Court. In October 1949, it was ordered to the preliminary calendar of inactive cases, subject to dismissal after May 20, 1950, for lack of prosecution.

12. On May 3, 1948, Market Street filed with the Commission an application, pursuant to the provisions of Section 11(e) of the Act, for approval of a plan embodying the terms of the settlement summarized in paragraph 10 above, except that it eliminated any provision for the election of Van Kirk Committee nominees as directors of Market Street. Said plan provided also for the settlement of the affairs of Market Street with a view to its ultimate liquidation and dissolution and the distribution of its residual assets to the holders of its prior preference stock. It provided for the collection from the

City and County of San Francisco of the balance due on the purchase price of Market Street's operative properties, for the sale of Market Street's real estate, furniture, and fixtures, for the disposition of all claims and actions pending against Market Street, and for cancellation of all rights of holders of its stocks junior to the prior preference stock. It included a request that the Commission approve the plan and apply to a court to effectuate and carry out its terms and provisions. A copy of the plan is annexed hereto as Exhibit "E" and incorporated herein by reference.

13. On May 7, 1948, Market Street received the balance due from the City and County of San Francisco, amounting to approximately $1,945,000 in cash. On the same date, the City and County of San Francisco brought an action against Market Street and its directors and treasurer, in the Superior Court of the State of California in and for the City and County of San Francisco (No. 375962), to enjoin the distribution of said cash by Market Street. A temporary injunction was issued by order of that court dated June 9, 1948. On January 20, 1950, that order was reversed by the District Court of Appeal of the State of California, First Appellate District, Division One (No. 14008).

14. On June 11, 1948, the Commission issued its Notice and Order directing that a hearing be held with respect to the plan referred to in Paragraph 12 above, and consolidating therewith the proceedings instituted by the Commission in its Order of

May 20, 1947, referred to in Paragraph 9, above. Said Notice and Order was published as Holding Company Act Release No. 8270, a copy of which is annexed hereto as Exhibit "F" and incorporated herein by reference, was published in the Federal Register, and was released to the press. Copies thereof were sent to all persons on the Commission's mailing list for releases under the Act, and the gist thereof was sent to all persons on the Commission's mailing list for such gists. Copies thereof were served upon Market Street, Standard Gas, Public Utility Engineering and Service Corporation, Cogan, counsel for Rosen, the California Railroad Commission, and the City of San Francisco, and were mailed by Market Street to each of its known security holders.

15. Pursuant to said Notice and Order dated June 11, 1948, public hearings were duly held in the consolidated proceedings. Counsel for the Division of Public Utilities of the Commission, for Market Street, for Standard Gas, for the Van Kirk Committee (Cogan), and for Rosen participated in the hearings. The City and County of San Francisco was admitted as a party. Upon completion of the hearings with respect to the issues raised by the plan, including the fairness of the proposed settlement and the fees that might appropriately be approved, briefs and reply briefs were filed, and oral argument was heard by the Commission.

16. On September 30, 1949, the Commission issued its Findings and Opinion, finding that if the

plan were modified in accordance therewith, the modified plan would be approved as necessary to effectuate the provisions of Section 11(b) of the Act and fair and equitable to the persons affected thereby. The principal modifications required by the Commission were the elimination of the proposed payments to Cogan upon the basis of a finding "that Cogan gave such attention to his personal interests and the fees which he hoped to secure, that his obligation of undivided loyalty to the stockholders whom he represented was not fulfilled," substitution of a payment of $7,500 by Market Street to the estate of the former Chairman of the Van Kirk Committee, who had died in December, 1947, in lieu of the payment of $25,000 to the Van Kirk Committee proposed in the plan, and a reduction of the amount payable by Market Street to Standard Gas from $550,000 to $512,500, the net amount which Standard Gas would have received under the plan after the proposed payments by Standard to Cogan and to the Van Kirk Committee. Payment of that amonut was approved as fair and equitable to Market Street and its prior preference stockholders and to Standard Gas, upon consideration of apparent overcharges against Market Street during the period 1926-1935 for services rendered by affiliates of Standard Gas, indicated in part by payments to Standard Power aggregating $270,000 by one of such affiliates, out of fees billed to Market Street, as well as consideration of the facts that some valuable services were rendered to Market Street, and that Standard Gas had made

substantial cash advances to Market Street for the servicing of Market Street's bonds then outstanding. The Commission also directed elimination from the plan of provision for a special meeting of prior preference stockholders, approved the payment by Market Street of a $5,000 fee to counsel for Rosen, and the payment by Standard Gas of a $10,000 fee to its counsel, and undertook, on condition that the plan would be appropriately modified, to instruct its counsel to make an application to the apropriate court for enforcement of the plan as modified. A copy of said Findings and Opinion, published as Holding Company Act Release No. 9376, is annexed hereto as Exhibit "G" and incorporated herein by reference.

17. On October 14, 1949, Cogan filed an action against Standard Power in the District Court of the United States for the District of New Jersey, in the name of the two surviving members of the Van Kirk Committee and an individual (Charles T. Jones) holding ten shares of the prior preference stock of Market Street, seeking to recover for Market Street the sum of $270,000, referred to in Paragraph 16 above, together with interest. Standard Power is at present a parent of Standard Gas but during the years 1926 through 1929, when the $270,000 was paid to Standard Power, it was a subsidiary of Standard Gas.

18. On December 14, 1949, Market Street filed an Amended Plan with the Commission pursuant to the Findings and Opinion of the Commission

dated September 30, 1949, and further provided in said Amended Plan, the steps proposed to be taken in consummation of the Amended Plan, including delivery of a full and complete release and discharge of any and all liability of Standard Gas and its subsidiaries to Market Street. A copy of the Amended Plan is annexed hereto as Exhibit "H" and incorporated herein by reference. In summary, the Amended Plan provides for the liquidation and winding up of Market Street by the payment of $512,500 to Standard; the sale of Market Street's furniture and fixtures; the disposition of all claims and actions pending against Market Street; the distribution of all remaining assets to the holders of Market Street's prior preference stock; the cancellation of all rights of holders of Market Street's stocks other than the prior preference stock; and the dissolution of Market Street.

19. On January 6, 1950, the Commission issued an Order to Show Cause why the Amended Plan should not be approved. Said Order was published as Holding Company Act Release No. 9597, a copy of which is annexed hereto as Exhibit "I" and incorporated herein by reference, was published in the Federal Register, and was released to the press. Copies thereof were sent to all persons on the Commission's mailing list for releases under the Act, and the gist thereof was sent to all persons on the Commission's mailing list for such gists. Copies thereof were served upon Market Street, Standard Gas, the California Railroad Commission, the City of San Francisco, Cogan, and counsel for Rosen.

20. Upon the return of that Order, counsel for the Division of Public Utilities of the Commission, for Market Street, for Standard Gas, and for the Van Kirk Committee (Cogan) appeared. In addition, Standard Power appeared by counsel and took the position that the intended effect of the proposed release of Standard Gas and its subsidiaries in the Amended Plan, referred to in paragraph 18 above, should be clarified in relation to its effect on claims of Market Street against Standard Power. Cogan objected to the execution of any release by Market Street, to the failure of the Amended Plan to provide a fee for him, to the reduction below $25,000 of the fee payable on account of services by the Van Kirk Committee, and to any payment of a fee to counsel for Rosen. The Secretary of the Van Kirk Committee advised the Commission that the Committee wholly approved the Amended Plan. Counsel for Rosen objected to the Amended Plan to the extent that it limited his fee to $5,000.

21. On March 9, 1950, the Commission issued its Supplemental Findings and Opinion, finding that the Amended Plan should be further amended to provide clearly for a complete release of Standard Gas and its subsidiaries, including Standard Power. The Commission stated it had previously found the proposed payment of $512,500 to Standard Gas to be fair and equitable as a resolution of all controversies between Market Street and Standard Gas and its subsidiaries, past and present, as a

step in the final winding up and dissolution of Market Street. A copy of the Commission's Supplemental Findings and Opinion, which was published as Holding Company Act Release No. 9718, is annexed hereto as Exhibit "J" and incorporated herein by reference.

22. On March 12, 1950, Cogan sent to the President of Market Street a night letter urging and advising him not to file the amendment required by the Commission "as being contrary to the interests of Market Street Railway Company and yourself." On March 23, 1950, Market Street requested an extension of time to file such an amendment to April 13, 1950, which extension was granted by minute of the Commission dated March 24, 1950. On March 30, 1950, the then board of directors of Market Street adopted a resolution refusing to approve such an amendment, in view of said night letter from Cogan, unless it should thereafter appear to the satisfaction of the board that other or different action should be taken in respect thereto. On April 14, 1950, a holder of 10,000 shares of prior preference stock of Market Street requested the Commission to enter an order extending to May 15, 1950, the time within which Market Street might file an appropriate amendment, so as to permit reconsideration by the board of directors of Market Street, after the annual meeting of stockholders to be held April 26, 1950, of the action theretofore taken. Said extension of time was granted by Order of the Commission dated April 18, 1950. Said Order was pub-

lished as Holding Company Act Release No. 9810, a copy of which is annexed hereto as Exhibit "K" and incorporated herein by reference.

23. On April 25, 1950, an action was instituted in this Court by Cogan, as co-counsel, on behalf of Jones, the holder of 10 shares of the prior preference stock of Market Street referred to in Paragraph 18 above, against Market Street, seeking, among other things, an injunction restraining Market Street from any further action upon or reconsideration of the resolution of its board of directors referred to in Paragraph 22 above, and an Order restraining and enjoining such action until further Order of this Court was entered (Civil Action File No. 29699). On May 2, 1950, said restraining Order was vacated by Order of this Court.

24. On May 3, 1950, Market Street filed an amendment modifying its Amended Plan in conformity with the Commission's Supplemental Findings and Opinion dated March 9, 1950. A copy of said amendment is annexed hereto as Exhibit "L" and incorporated herein by reference.

25. On May 3, 1950, the Commission issued its Order pursuant to Section 11(e) of the Act finding the Amended Plan, as so modified, to be necessary to effectuate the provisions of Section 11(b) of the Act and fair and equitable to the persons affected thereby. A copy of said Order is annexed hereto as Exhibit "M" and incorporated herein by reference.

26. Market Street has requested the Commission to apply to an appropriate court, in accordance with the provisions of Section 11(e) and 18(f) of the Act, to enforce and carry out the terms and provisions of the Amended Plan, as modified, and the Commission makes this application pursuant to said request.

27. Pending a final Order herein, the institution or prosecution of any action or proceeding in this or any other forum, by or on behalf of Market Street, Standard Gas, or Standard Power, or by any security holder of any of said corporations, or by any other person, with respect to any of the actions or transactions proposed in or contemplated by the Amended Plan, as modified, or the Commission's Order dated May 3, 1950, approving it, would interfere or tend to interfere with compliance with said Order and with the orderly enforcement of the Amended Plan, as modified, by this Court, and would result in unnecessary expense and delay detrimental to Market Street and to its security holders.

Wherefore, applicant respectfully prays that the Court, in accordance with the provisions of Section 11(e) of the Act, take the following action:

(a) Hold a hearing on this application;

(b) Order Market Street to give such notice of said hearing as the Court may deem appropriate;

(c) After notice and opportunity for hearing, approve the Amended Plan, as modified, as fair and equitable and as appropriate to effectuate the pro-

visions of Section 11 of the Act, and, to such extent as the Court deems necessary for the purpose of carrying out the terms and provisions of the Amended Plan, as modified, take exclusive jurisdiction and possession of Market Street and its assets, wherever located;

(d) Issue an appropriate order enforcing and carrying out the terms and provisions of the Amended Plan, as modified, and directing Market Street and its officers, directors, and agents to take such steps and to do such acts as may be necessary in order to carry out the terms and provisions of the Amended Plan, as modified, and such order of the Court;

(e) Enjoin and restrain, during the pendency of these proceedings, Market Street, Standard Gas, Standard Power, all security holders of said corporations, and all other persons, from doing any act or taking any action interfering or tending to interfere with these proceedings or with the enforcement or carrying out the Amended Plan, as modified, or with compliance with the Order of the Commission approving it, including the commencement or prosecution of any action, suit, or proceeding, at law or in equity or under any statute, in any court or before any executive or administrative officer, commission, or tribunal, other than such proceedings before the Commission or this Court as may be appropriate under the Act and the rules and regulations promulgated thereunder, and such review, if any, in an appropriate appellate court of

the United States as may be provided by law;

(f) After approval of the Amended Plan, as modified, enjoin Standard Gas, Standard Power, all security holders of said corporations and of Market Street, and all other persons, from doing any act or taking any action interfering or tending to interfere with these proceedings or with the enforcement or carrying out the Amended Plan, as modified, or with compliance with the Order of the Commission approving it, including the commencement or prosecution of any action, suit, or proceeding at law or in equity or under any statute, in any court or before any executive or administrative officer, commission, or tribunal, other than such proceedings before the Commission or this Court as may be appropriate under the Act and the rules and regulations promulgated thereunder, and such review, if any, in an apppropriate appellate court of the United States as may be provided by law.

(g) Grant such other, further, and different relief, and enter such other orders or decrees, as the Court may find to be equitable and just in the premises.

May 3, 1950.

/s/ MYRON S. ISAACS,
Special Counsel Division of Public Utilities.

/s/ ARTHUR E. PENNEKEMP,

/s/ HOWARD S. GUTTMANN,

Attorneys for the Applicant, Securities and Exchange Commission.

State of California,
City and County of San Francisco—ss.

Myron S. Isaacs, being duly sworn, deposes and says that he is an attorney for the Securities and Exchange Commission, applicant herein, that he has read the foregoing application, and that to the best of his knowledge, information, and belief, the facts contained therein are true and correct.

/s/ MYRON S. ISAACS.

Subscribed and sworn to before me this 3rd day of May, 1950.

[Seal] /s/ [Indistinguishable.]

Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires Oct. 6, 1953.

EXHIBIT E

Plan for Recapitalization of Market Street Railway Company (a California corporation)

Pursuant To The Provisions Of Section 11(e) Of The Public Utility Holding Company Act Of 1935, For The Purpose Of Enabling Said Company To Comply With The Provisions Of Section 11(b) Of Said Act.

I.

Summary of the Plan

Introductory

For brevity, Market Street Railway Company, a California corporation, is referred to herein as "Market Street"; Standard Gas and Electric Company, a Delaware corporation, as "Standard"; the Securities and Exchange Commission as "the Commission"; the Public Utility Holding Company Act of 1935 as "The Act," and the plan hereinafter set forth as "the Plan."

The full terms of the Plan are hereinafter set forth under the heading "Provisions of the Plan." For convenient reference, the Plan is summarized in the several paragraphs immediately following. The Plan will not become effective unless approved by the Securities and Exchange Commission and a Court of appropriate jurisdiction.

Summary of the Plan

In brief, the Plan provides for a settlement of

the open account indebtedness owing by Market Street to Standard, the elimination of, or the termination of all rights of, the Preferred 6% Cumulative Stock, Second Preferred 6% Stock and Common Stock of Market Street, reduction of the remaining assets of Market Street to cash, disposition of all claims against Market Street through settlement or otherwise, including the actions now pending for injuries and damages and the claims for workmen's compensation and benefits arising from compensable injuries to or death of former employees, the liquidation of Market Street through distribution to the holders of its Prior Preference 6% Cumulative Stock of its assets remaining at the time of such liquidation and its dissolution.

II.

Provisions of the Plan

Terms and Operations of the Plan

Prior to 1944 Market Street was engaged in the operation of a street railway system in and about the City of San Francisco, California. On September 29, 1944, Market Street sold and delivered its operative properties to the City and County of San Francisco for the sum of $7,500,000. Of this amount $5,618,601.29 has been paid to Market Street leaving an unpaid balance as of March 31, 1948, of $1,937,943.64, of which $56,544.93 represents interest accrued on the unpaid balance of the purchase price at 4% per annum.

Market Street has issued and there are now out-

standing 116,185 shares of Prior Preference 6% Cumulative Stock, par value $100 per share, hereinafter sometimes referred to as "Prior Preference Stock"); 49,865½ shares of Preferred 6% Cumulative Stock, par value $100 per share, (hereinafter sometimes referred to as "Preferred Stock"); 46,737 shares of Second Preferred 6% Stock, par value $100 per share, (hereinafter sometimes referred to as "Second Preferred Stock") and 106,474 shares of Common Stock, par value $100 per share. Standard is the owner of 39,250 shares of Preferred Stock, 25,500 shares of the Second Preferred Stock and 61,900 shares of Common Stock of Market Street. The shares of stock so owned by Standard constitute 39.67% of the voting securities of Market Street. Market Street is a subsidiary of Standard. Standard is a registered holding company under the Act. Cumulative dividends on the Prior Preference Stock of Market Street are in arrears from April 1, 1920 to December 31, 1921 and from January 1, 1924 to date; on December 31, 1947 the aggregate amount of such cumulative dividends in arrears was $154.50 per share or $17,950,582.50. Cumulative dividends on the Preferred Stock of Market Street are in arrears from April 1, 1921 to date; on December 31, 1947 the aggregate amount of such cumulative dividends in arrears was $160.50 per share, or $8,003,894.25.

As of December 31, 1947, Market Street owed to Standard the amount of $976,726.63, representing the unpaid balance of its open account indebtedness, together with interest thereon computed at the rate

of 4% per annum. There is presently pending in the District Court of the United States for the Northern District of California, Southern Division, an action (Civil Action File No. 26807-R) brought by Standard against Market Street to recover the balance of the unpaid principal of such open account indebtedness, plus accrued interest thereon at the rate of 6% per annum, aggregating at December 31, 1947, the sum of $1,111,494.67, the difference of $134,768.04 resulting from Market Street having accrued interest at the rate of 4% per annum, whereas Standard accrued interest at the rate of 6% per annum. Russell M. Van Kirk, Bloomfield Hulick and Edmund T. Willetts, as a Protective Committee for the holders of Prior Preference Stock of Market Street (hereinafter referred to as the "Van Kirk Committee") have appeared in said action, and Lea Rosen, a holder of Prior Preference Stock, has filed a petition for leave to intervene therein. Said action is now pending and undetermined.

Market Street and Standard and the Van Kirk Committee, after extended negotiations, have arrived at a settlement agreement with respect to such open account indebtedness of Market Street to Standard and such litigation on the following basis.

(a) Market Street will pay to Standard the sum of $550,000 and will deliver to Standard a full and complete release and discharge of any and all liability of Standard to Market Street for any cause whatsoever.

(b) Standard will accept such sum of $550,-000 (together with performance by Market Street of its share of the settlement obligations set forth in subparagraphs (c) and (d) below) in full payment of the open account indebtedness of Market Street to Standard and any and all interest accrued thereon, and will deliver to Market Street a full and complete release and discharge of any and all liability of Market Street to Standard because of such open account indebtedness and for any other cause whatsoever.

(c) Coincident with such payment by Market Street to Standard there will be paid to William J. Cogan, as the attorney for the Van Kirk Committee, the sum of $50,000 for his fees, $25,000 of which will be paid by Market Street and the remaining $25,000 of which will be paid by Standard.

(d) Coincident with such payment by Market Street the members of the Van Kirk Committee will be paid, as fees or compensation, the sum of $25,000, one-half of which will be paid by Market Street and the remaining one-half by Standard. Market Street will also reimburse the Committee for its expenses in an amount estimated not to exceed $5,000.

As of December 31, 1947 there were pending against Market Street 197 actions for injuries and damages praying for judgments in the aggregate amount of $2,770,976. There were also pending cer-

tain claims for compensation and benefits arising from compensable injuries and death of former employees in accordance with the Workmen's Compensation Law of the State of California.

Market Street will continue the settlement of its affairs with a view to its ultimate liquidation and dissolution as follows:

(1) By payment to Standard in settlement of the open account indebtedness and the action brought thereon upon the basis outlined above.

(2) Collects from the City and County of San Francisco the balance of the purchase price of its operative properties, together with interest thereon.

(3) Sells its remaining real estate and office furniture and fixtures.

(4) Disposes of all claims including the actions for injuries and damages pending against it.

(5) Disposes of claims for workmen's compensation and benefits.

Upon the Plan becoming effective by a final order of the Commission and a final decree of Court, all rights of the holders of the Preferred Stock, Second Preferred Stock and Common Stock of Market Street shall thereupon cease and terminate, and the holders of such Preferred Stock, Second Preferred Stock and Common Stock shall have no further rights with respect to the voting of such stock or to

participate in any distribution of the assets of Market Street upon liquidation.

Within 100 days after the Plan has become effective by a final order of the Commission and a final decree of Court, a special meeting of the holders of the Prior Preference Stock will be held to elect a new Board of Directors. If such effective date occurs within 100 days of the next regular meeting of the stockholders of Market Street no special meeting will be held and such new Board of Directors shall then be elected at such next regular meeting.

The payment of fees and expenses in connection with the Plan shall be subject to the supervision of the Commission, and Market Street will pay such fees and expenses as shall be approved by the Commission (other than the fees and expenses to be paid by Standard upon the settlement of its claim as set forth above), provided that the fees and expenses so to be paid by Market Street with respect to the Van Kirk Committee and its counsel shall in no event exceed the amounts hereinbefore set forth. The assets of Market Street remaining after the payment of such fees and expenses, or after provision for the payment thereof has been made, and its affairs settled as outlined above, will be distributed pro rata to the holders of its Prior Preference Stock in full satisfaction of the claims of the holders of such stock and all accrued and unpaid dividends thereon.

Method of Carrying the Plan Into Effect

Market Street has filed with the Commission an application to it requesting that the Commission find the Plan necessary to effectuate the provisions of Subsection (b) of Section 11 of the Act, and fair and equitable to the persons affected by the Plan; that the Commission make an order approving the Plan; and that the Commission apply to a Court in accordance with the provisions of Subsection (f) of Section 18 of the Act as set forth in Section 11(e) thereof, to effect and carry out the terms and provisions of the Plan. The Plan, when made effective by a final order of the Commission and by a final decree or order of Court, will be binding upon all stockholders of Market Street.

Dated: April 22, 1948.

EXHIBIT G

For Release in Morning Newspapers of Saturday, October 1, 1949

Securities and Exchange Commission
Washington, D. C.

Holding Company Act of 1935
Release No. 9376

In the Matter of
MARKET STREET RAILWAY COMPANY

File No. 54-169

MARKET STREET RAILWAY COMPANY, and STANDARD GAS AND ELECTRIC COMPANY, and Certain of Its Subsidiary Companies

File No. 4-63

RUSSELL M. VAN KIRK, BLOOMFIELD HULICK, EDMUND T. WILLETTS, Committee for the MARKET STREET RAILWAY COMPANY Prior Preference Capital Stock

File No. 68-84

(Public Utility Holding Company Act of 1935)

FINDINGS AND OPINION OF THE COMMISSION

Plan Under Section 11(e)

Necessity

Plan filed by non-utility subsidiary of registered holding company, providing for settlement of all

claims against it, pro rata distribution of remaining assets to prior preference stockholders, and dissolution, held, necessary under Section 11(b) to correct unfair and inequitable distribution of voting power of subsidiary.

Fairness

Plan filed by non-utility subsidiary of registered holding company providing for compromise settlement of open-account indebtedness owing to parent, payment of fees to prior preference stockholders' committee and its attorney by subsidiary and parent, payment of all claims against subsidiary and pro rata distribution of remaining assets to prior preference stockholders, held, fair and equitable upon condition that plan be amended to eliminate, inter alia, payment of any fees to attorney and reduction of amount to be received by parent from subsidiary by amount of fees proposed to be paid by parent.

Appearances:

CYRIL APPEL,
    For Market Street Railway Company.

HELMER HANSEN,
    Of Flynn, Clerkin & Hansen, for Standard Gas and Electric Company and Public Utility Engineering and Service Corporation.

FREDERIC SAMMOND,
    Of Miller, Mack & Fairchild, for Public Utility Engineering and Service Corporation.

WILLIAM J. COGAN,

For Russell M. Van Kirk, et al., Stockholders Protective Committee Prior Preference 6% Cumulative Stock of Market Street Railway Company.

MILTON PAULSON,

For Lea Rosen, a Holder of Prior Preference Stock of Market Street Railway Company.

DION R. HOLM,

For the City and County of San Francisco, California.

PAUL S. DAVIS and

THEODORE PLOTNICK,

For the Division of Public Utilities of the Commission.

Market Street Railway Company ("Market Street"), a non-utility subsidiary of Standard Gas and Electric Company ("Standard"), a registered holding company, seeks approval of a plan which it has filed pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935 ("the Act").[1] The plan involves, in substance, the settlement of a claim asserted by Standard against Market Street and the subsequent liquidation and dissolution of Market Street on a basis whereby the holders of the Prior Preference 6% Cumulative Stock ("Prior Preference Stock") are to receive all residual as-

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[1]Standard has been ordered, pursuant to Section 11(b)(1) of the Act, to dispose of its interests in Market Street. 9 S.E.C. 862 (1941).

sets of the company. Proceedings on the plan were consolidated with investigation proceedings previously instituted by us pusuant to Sections 11(a), 18(a) and 18(b) of the Act with respect to the relationships and transactions between Market Street and Standard and Standard's former subsidiary service company, Byllesby Engineering and Management Corportaion ("Byllesby Engineering"),[2] the name of which was changed in 1935 to Public Utility Engineering and Service Corporation.

After appropriate notice, public hearings were held in the consolidated proceedings.[3] At such hearings leave to be heard was granted to Russell M. Van Kirk, Bloomfield Hulick and Edmund T. Willetts, acing as a committee ("Van Kirk Committee")[4] for holders of Prior Preference Stock, and to Lea Rosen, a holder of Prior Preference Stock. The City and County of San Francisco was admitted as a party after the filing of the plan, but it did not participate at any of the hearings. Briefs have been filed by Market Street, the Van Kirk Committee, Rosen and the City and County of San Francisco and we have heard oral argument. On the basis of the record in the consolidated proceedings we make the following findings:

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[2]Holding Company Act Release No. 7425 (1947).

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[3]Holding Company Act Release No. 8270 (1948).

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[4]The record indicates that Russell M. Van Kirk was the only active member of the Committee. Van Kirk died shortly after the settlement, hereinafter discussed, was reached.

Description of Market Street

Market Street, a California corporation, was formerly engaged in the operation of a street railway system in and about the City of San Francisco. On September 29, 1944, Market Street sold its operating properties to the City and County of San Francisco for the sum of $7,500,000, of which the last installment, amounting to $1,945,345.70, was paid on May 7, 1948.

The following is a balance sheet of Market Street as of June 30, 1948:

Table I

Assets		
Current Assets:		
Cash	$ 106,161	
U. S. Government securities	3,243,000	
Other	12,241	$ 3,361,402
Land, Buildings, Furniture and Fixtures		7,250
Deposits:		
Collateral security for self-insurance under Workmen's Compensation and Safety Act	62,936	
Other	1,000	63,936
Total Assets		$ 3,432,670
Deferred Charges		82

Liabilities		
Current Liabilities		$ 4,482
Indebtedness to Standard Gas and Electric Co.		990,832
Bonded Indebtedness:		
Bonds, Scrip and Interest Coupons not redeemed	$ 11,525	
Cash on Deposit with Trustee	11,525	....
Option Deposit on Proposed Real Estate Sale		20,000
Capital Stock—$100 par value per share:		
Prior Preference 6% Cumulative	$11,618,500	
Preferred 6% Cumulative	4,986,850	
Second Preferred 6% (non-cumulative)	4,673,700	
Common	10,647,400	31,926,450
Deficit a/		(29,509,094)
Total Liabilities		$ 3,432.670

( ) Denotes red figure.

a/ No provision made for contingent liabilities or preferred stock dividend arrearages.

It will be noted from the balance sheet that the assets of Market Street are almost wholly liquid and that it has no income producing property except as it derives income from its holdings of government securities. In fact, since the sale of its operating properties, Market Street's expenses have exceeded its income and such deficits will in all likelihood continue until dissolution. The income deficits have been as follows:

Three months ended December 31, 1944...$126,009
Year ended December 31, 1945............$486,446
Year ended December 31, 1946............$300,406
Year ended December 31, 1947............$208,221

As against assets of some $3,400,000, which can be

expected only to decrease as the life of Market Street is prolonged, there are claims for a far greater amount. The claims fall into the following classes: persons claiming against Market Street for alleged torts arising from its former transportation operations; claims for workmen's compensation and benefits; the claim of Standard as a creditor; and the claims of Market Street's stockholders.

There were 183 tort claims pending against Market Street as of June 30, 1948, the amount sued for aggregating $2,543,772. According to the company's 1948 annual report to stockholders, these claims had been reduced to 135 at December 31, 1948, in an amount aggregating $1,789,089. The management estimated, on the basis of its experience, that the aggregate cost of future payments of claims and damages, including litigation incident thereto, and expenses for the remainder of the company's corporate existence would approximate $560,000 at December 31, 1947, and $428,000 at December 31, 1948.[5]

Claims for workmen's compensation and benefits had a total estimated future cost of $34,351 as of June 30, 1948, according to Market Street's report to the California Department of Industrial Relations.

The claim of Standard as a creditor is based upon a book open account indebtedness owed by Market Street to Standard. According to the books of Mar-

[5]From September 29, 1944, to June 30, 1948, the company disposed of 387 litigated claims, aggregating $5,149,882, by payment of $556,308, and 298 unlitigated claims by payment of $46,572.

ket Street, as of June 30, 1948, it owed Standard $990,832, representing $707,189 of principal plus accrued interest to that date. Standard, however, claimed an additional $141,859 was owing on the open account as of June 30, 1948. The variance is due to a difference in interest accruals since October 24, 1939. Interest at the rate of 6% on the daily balances has been accrued by Standard from the origin of the open account to date. Interest at that rate was accrued by Market Street until October 24, 1939, when it reduced the interest rate on the open account from 6% to 4% in conformity with a plan for the extension of then outstanding bonds approved by the California Railroad Commission on October 24, 1939. Standard contends that it is not bound by the reduction since it was not a party to the proceedings before the California Railroad Commission. In January 1947 Standard brought suit against Market Street on the open account, claiming an amount which reflected the accrual of interest at 6%.[6] Pending our proceedings, the suit has not been prosecuted.

The final claims against Market Street are those of the holders of its outstanding stock. In their order of preference, Market Street has outstanding 116,185 shares of Prior Preference Stock, $100 par value, all publicly held; 49,868½ shares of Preferred 6% Cumulative Stock, $100 par value, of which Standard owns 39,250 shares; 46,737 shares

[6]District Court of the United States, Northern District of California, Southern Division, Civil Action No. 26807-R.

of Second Preferred 6% Stock (non-cumulative), $100 par value, of which Standard owns 25,500 shares; and 106,474 shares of Common Stock, $100 par value, of which Standard owns 61,900 shares. Standard's holdings constitute 39.67% of the voting securities of Market Street. Dividend arrearages at June 30, 1948, were as follows:

	Per Share	Total
Prior Preference	$157.50	$18,299,138
Preferred 6% Cumulative	163.50	8,153,500
Total		$26,452,638

Provisions of the Plan

Market Street proposes to settle its affairs with the view to its ultimate liquidation and dissolution in the following manner:

(1) Market Street would pay to Standard the sum of $550,000 in cash in complete settlement of the open account indebtedness due from Market Street to Standard. Coincident with such payment, William J. Cogan, attorney for the Van Kirk Committee, would be paid the sum of $50,000 for his fees, one-half to be paid by Standard and one-half by Market Street; the Van Kirk Committee would be paid the sum of $25,000, one-half by Standard and one-half by Market Street; and the Van Kirk Committee also would be reimbursed by Market Street for its expenses in an amount not to exceed $5,000.

(2) Market Street would sell its remaining real estate and office furniture and fixtures.[7]

(3) Market Street would dispose of all claims pending against it including actions for injuries and damages and claims for workmen's compensation and benefits.

(4) Upon the plan becoming effective by a final order of the Commission and a final decree of an appropriate court, all rights of stockholders other than Prior Preference stockholders shall cease and terminate.

(5) Within a hundred days after the plan becomes effective a special meeting of the holders of the Prior Preference Stock would be held to elect a new Board of Directors. If such effective date occurs within 100 days before the next regular meeting of stockholders, no special meeting would be held and the new Board of Directors shall be elected at such regular meeting.

(6) Market Street would pay such fees and expenses in connection with the plan as shall be approved by the Commission.

(7) The assets of Market Street, remaining after payment of and provision for fees, expenses and other obligations, would be distributed pro rata to the holders of Prior Preference Stock.

Market Street has requested that the Commission, if it approves the plan, make application to an

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[7]As of June 30, 1948, the carrying value on the books of Market Street amounted to $7,249.83.

appropriate court for enforcement in accordance with the provisions of Sections 11(e) and 18(f) of the Act.

Applicable Statutory Standards

Before we can approve the proposed plan of Market Street under Section 11(e) of the Act, we must find the plan necessary to effectuate the provisions of Section 11(b) of the Act and fair and equitable to the persons whom it affects. We first consider the necessity of the plan.

Necessity of the Plan

We have consistently held that to be "necessary" within the meaning of Section 11(e), a plan need not be the only plan capable of effectuating the provisions of Section 11(b), but that it will comply with the "necessity" standard if it will achieve the results required by the statute in an appropriate manner.[8]

It is clear that an unfair and inequitable distribution of voting power exists in Market Street. The holders of Prior Preference Stock, as we find in our subsequent discussion of the fairness of the plan, are entitled to all of the equity in the enterprise, yet their holdings presently represent only approximately 36% of the voting power, while Standard, whose only monetary interest in the company is through the open account indebtedness, controls the company through stockholdings which are without value and represent 39.67% of the voting

[8] Lahti v. New England Power Association, 160 F. 2d 845 (C.A. 1, 1947).

power. We find that the dissolution and liquidation of Market Street is necessary and the plan if amended to conform with the changes hereinafter set forth will satisfy the standards of Section 11(e) of the Act. We turn next to the fairness of the plan.

Fairness of the Plan

In order to approve a plan under Section 11(e) as fair and equitable, we must find that each person affected thereby will receive, in the order of his priority, from that which is available for the satisfaction of his claim, the equitable equivalent of the rights surrendered.[9]

All of the persons whom we have described as having claims of one kind or another are affected by the plan and we must thus consider the fairness of the plan: as between stockholders of Market Street and Standard as a creditor; as among the several classes of stockholders of Market Street; and as to the tort and workmen's compensation claimants.

(1) Fairness as between stockholders of Market Street and Standard as a creditor.

In May 1947, after requests from Van Kirk and his attorney, Cogan, who raised questions of the validity of Market Street's open account indebtedness, we instituted proceedings pursuant to Sections 11(a), 18(a) and 18(b) of the Act for investigation of the company and, in this connection, in order not to render the investigation fruitless we entered our

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[9]Otis & Co. v. S.E.C., 323 U.S. 624, 640 (1945).

order prohibiting Market Street from making any further payments to Standard.[10] In the investigation hearings, in which both Cogan and Milton Paulson, attorney for Rosen, participated, considerable testimony was taken and documentary evidence adduced with respect to the relationships and transactions between Market Street and Standard and its affiliates, past and present. In particular, the services rendered to Market Street by Byllesby Engineering and the creation and history of the open account were explored. During the course of those proceedings, both Cogan and Paulson separately initiated negotiations with Standard for a settlement of the open-account controversy. It appears from the record that Standard wished, if possible, to negotiate with Cogan and Paulson jointly, which was agreeable to Paulson but not to Cogan. Standard finally conducted negotiations solely with Cogan, who represented approximately 36,500 shares. In December, 1947, Standard announced that it and Cogan had reached a settlement of the open account. The agreement then announced differed from the plan now before us in that it provided

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[10]On August 1, 1947, we denied a motion by Standard that we vacate our order of May 20, 1947, and dismiss the proceedings, ... S.E.C. ......, Holding Company Act Release No. 7609. An appeal from this ruling and a request for a stay of the investigation proceedings was taken to the Court of Appeals for the Third Circuit; the request for a stay of the proceedings was denied by the Court on August 6, 1947, and on January 1, 1948, by stipulation, the appeal was dismissed. Civil Action No. 9481.

that Standard would cooperate in the election of nominees of the Van Kirk Committee as a majority of the directors of Market Street and that we would be requested to terminate our investigation and dissolve our prohibition against payments by Market Street to Standard. Our staff advised Standard that it would not recommend our approval of the latter proposals and that the settlement should be presented to us in terms of a thoroughgoing reorganization plan under Section 11(e) of the Act which treated with the rights of all interested persons. Thereafter, Market Street filed the plan now before us.

As heretofore stated, the plan provides that the open account, which at June 30, 1948, amounted to $990,832 according to the books of Market Street and $1,132,691 according to the books of Standard, is to be settled by the payment of $550,000 by Market Street to Standard. Since Standard has agreed to pay $37,500, representing one-half of the proposed fees for Cogan and the Van Kirk Committee, the net settlement to Standard amounts to $512,500 and it is this amount, as our subsequent discussion shows, which we shall regard as the proposed settlement. It is our duty to appraise independently the proposed payment in order to determine whether it achieves fairness and equity to the persons affected.

Market Street first came into the Standard system during 1924 and 1925 when voting control of Market Street was acquired by H. M. Byllesby & Company, which had originally organized Standard and controlled the Standard system. It was testi-

fied that the acquisition of Market Street was made without any investigation of its financial condition and that it had occurred as an incident to a fight for control of Philadelphia Company, which became a subsidiary of Standard. In 1925, Byllesby vested its interest in Market Street in Standard Power and Light Corporation (Del.), then a subsidiary of Standard. In 1930, Standard Power became the parent of Standard which at that time acquired directly the Market Street securities it now holds.

Prior to its acquisition by H. M. Byllesby & Company, Market Street was in parlous financial condition. Although it had emerged from a reorganization in 1921, it has never paid a dividend on either of its two junior preferred stocks or common stock and has paid dividends on its Prior Preference Stock only in 1922 and 1923 after being in arrears for 1921. As of December 31, 1925, the year in which control was acquired, Market Street's common stock equity (after adjustment for preferred stock arrearages) was slightly over 20%; as of December 31, 1935, common stock equity, on the same basis, was less than 4%.[11] During the intervening period, however, there had been a reduction of $6,472,000 from the $12,329,000 of 7% bonds, due 1940, which were outstanding at the beginning of the period, while $867,350 of indebtedness to af-

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[11]No adjustment has been made for the amount by which book value of the properties exceeded realizable value. If such adjustment were made, there was probably no common stock equity at either date.

filiates was incurred and surplus rose by about $1,750,000.

In November, 1925, the management of Market Street was assumed by Byllesby Engineering, which appointed its Pacific Coast representative, Samuel Kahn, as executive vice-president of Marekt Street. In February, 1927, an agreement was entered into between Market Street and Byllesby Engineering in which the latter undertook to render various services to Market Street for a period from January 1, 1927, to December 31, 1931. In the same contract, Market Street agreed to pay the sum of $125,000 for the management services rendered to it by Byllesby Engineering during the year 1926. The service contract provided for a variety of management services: obtaining of personnel; assistance in negotiating contracts and loans; purchase of merchandise at discount; supervision of auditing and accounting, local sales of securities, and advertising and publicity; securing of insurance and necessary property appraisals; and general availability for any other management matters. The contract provided for compensation at the rate of not more than 2½% of the gross revenues of Market Street and not less than $150,000 annually. On January 1, 1932, this agreement was renewed for a period of five years, but by mutual consent payments under the agreement were discontinued on October 1, 1935, shortly after the Holding Company Act was passed. Thereafter any services that were rendered to Market Street were paid for item by item on a cost

basis, and Kahn, who had become president of Market Street in 1927 and whose annual salary of $37,500 had been paid by Byllesby Engineering, was paid directly by Market Street.

The following tabulation shows service company charges from 1926 to 1947, inclusive:

Table II

Year	Supervision Fees	Appraisal Services	Services	Total
1926	$125,000.00 (a)	$3,395.00	....	$128,395.00
1927	150,000.00	....	$ 79.46	150,079.46
1928	200,000.00	....	....	200,000.00
1929	200,000.00	450.00	....	200,450.00
1930	175,000.00	....	....	175,000.00
1931	175,000.00	....	....	175,000.00
1932	168,750.00	....	....	168,750.00
1933	150,000.00	....	....	150,000.00
1934	125,000.00	....	....	125,000.00
1935	93,750.00	....	....	93,750.00
1936	....	....	....	....
1937	....	....	....	....
1938	....	....	....	....
1939	....	....	18.42	18.42
1940	....	....	638.89	638.89
1941	....	....	171.34	171.34
1942	....	....	12.25	12.25
1943	....	....	493.53	493.53
1944	....	....	108.80	108.80
1945	....	....	....	....
1946	....	....	34.81	34.81
1947	....	....	....	....
Totals	$1,562,500.00	$3,845.00	$1,557.50	$1,567,902.50

Note: (a) $95,000 of this amount was billed in February 1927.

As the table indicates, Market Street was charged $1,562,500 for supervision fees by Byllesby Engineering under the management contract up to October 1, 1935. Of this amount some $375,000 was paid to Kahn for his services as the president of

Market Street, the balance of $1,187,500 being for other services under the contract. What those services were is difficult to determine from the record. Nearly everyone concerned with the transactions which took place from 1926 to 1935 is dead or has no present recollection of what occurred. Records for those years have in most instances been long destroyed. Kahn, presumably with the best knowledge of what transpired, could recall few specific facts and was able to testify only in a general way. He testified that he directed the activities of the company, that he was in constant touch with the home office of Byllesby Engineering in Chicago and that major decisions were made jointly by him and Byllesby Engineering. Kahn also testified that an auditor who looked after the West Coast interests of the Standard system devoted about one-third of his time to Market Street, and that the service company supervised the accounting department of Market Street, performed some publicity work, effected some savings by securing better premiums in group life insurance policies, made some purchases at a discount, and gave assistance in the preparation of federal income tax returns.

Upon the basis of the record as it stands, it appears that Market Street was greatly overcharged for the services which it received. This is borne out also by the fact that Standard Power and Light Corporation (which, as before mentioned, held the securities of Market Street directly until 1930)

received from Byllesby Engineering a portion of the fees billed to Market Street, as follows:

1926	$ 50,000.00*
1927	60,000.00
1928	80,000.00
1929	80,000.00
	$270,000.00

*Includes $38,000.00 received in 1927.

In arriving at this conclusion we must point out that the settlement was arrived at during the course of the hearings and that, in presenting it to us, Standard stated that, if the settlement should not be approved, it desired to proceed with the investigation and that it had retained independent engineers to study and reconstruct the services rendered under the management contract.

Of the total of $1,562,500 charged under the contract up to 1935, $231,250 appears in the present open account, and represents management fees owed by Market Street which were either paid or assumed by Standard. A summary reflecting this item and the other principal charges and credits in the open account as of December 31, 1947, as shown on the books of Market Street follows:

Table III

Principal

Cash Advances			
By Standard:			
1931	$300,000.00		
1932	250,000.00		
1933	150,000.00		
1935	84,000.00	$784,000.00	
Repayment by Market Street:			
1933	$150,000.00		
1945	155,904.76	305,904.76	
Net Cash Advances		$478,095.24	
Management Fees			
Paid or Assumed by Standard:			
1932	$ 81,250.00		
1933	150,000.00	231,250.00	
Miscellaneous Credits		(2,156.00)	$707,189.24
Interest			
Interest Accrued at 6%			
Accruals:			
9/25/31 through 10/24/39		$363,984.49	
Less, Payments:			
October 1931 through May 1938 (paid monthly)	$290,490.99		
January 1939	4,398.26		
July 1945	25,000.00		
November 1945	44,095.24	363,984.49	
Interest Accrued at 4%			
Accruals:			
10/25/39 through 12/31/47			269,537.39
Total Principal and Interest (per records of Market Street) at December 31, 1947			$976,726.63

The foregoing table indicates that the open account as of December 31, 1947, represented $478,095 of unpaid cash advances, $231,250 of unpaid management fees and $269,537 of unpaid interest at 4%. As recorded in the books of Standard, the unpaid interest is larger, being computed at 6%. Table III also shows that Standard has already received $363,984 in interest payments computed at 6%. Of the $784,000 of cash advances made by Standard to Market Street, $700,000 represents loans made in 1931, 1932 and 1933 to service Market Street's bonded indebtedness, and $84,000 was an advance in 1935 to enable Market Street to pay management fees to Byllesby Engineering.

We think the record is clear, as heretofore stated, that Marekt Street was grossly overcharged for services, a practice common to the industry prior to the enactment of the Holding Company Act, and one which we cannot condone in arriving at a determination of fairness and equity. The difficulty in the present case is how to determine the amount of the overcharge since it is clear that some services were rendered and were valuable. In addition, in the course of the dealings between Standard and Market Street, Standard made approximately $400,-000 of cash advances for the servicing of Market Street's bonds which may be given recognition in appraising the fairness of the settlement.

Thus, the matter sums up as one of appraising whether the "give-up" by Standard of all of the open account, except an amount which approximates the balance of cash advances for bond servic-

ing plus interest, results in a fair settlement. While it appears to us that, on balance, the settlement is a favorable one for Standard, several elements have caused us to conclude that it is fair and equitable to all concerned. All of the participants in the proceedings have desired to settle, apparently from an awareness, which we can recognize, that prompt disposition was valuable in preventing the frittering away of the assets of this unproductive enterprise. Against the possibility that we might find upon the completion of the record that Standard should receive from this estate some amount less than $512,500, or even nothing, we must consider the cost to the Prior Preference Stockholders of further proceedings and litigation which would prolong the life of a company in which expenses can be expected to exceed income. In this connection, it is to be noted that while we have not accepted Cogan's negotiations as an indicum of fairness, Paulson, who was not a party to the settlement, has stated that he could approve the proposed settlement of the open account if all fees and expenses in connection therewith be paid by Standard.

Throughout the foregoing analysis we have discussed the settlement to Standard on the basis of the net amount which is proposed to be retained by Standard under the plan. The gross amount, $550,000, is, in our view, a reasonable and fair settlement of the matters in controversy. However, of such gross amount Standard agreed to pay $37,500 toward fees which might otherwise be payable by Market Street. In view of our disposition of the

fees proposed under the plan we think it appropriate that Market Street pay Standard only the net amount which Standard contemplated it would retain under the settlement. Obviously, in matters of this nature it is impossible to pin-point a fair settlement and a range is the best that can be achieved. We find that $512,500 falls within the realm of fairness and that the plan should be amended to provide for payment to Standard of that amount.

(2) Fairness as among classes of stockholders of Market Street

The charter of Market Street provides that upon dissolution, the holders of Prior Preference Stock shall be entitled to receive "out of any otherwise undistributed surplus profits the amount of any accrued and unpaid dividends thereon, and out of assets the par value thereof before any distribution or payment is made on the Preferred Stock, Second Preferred Stock or Common Stock * * *"

The aggregate par value of the Prior Preference Stock is $11,618,500 and as of June 30, 1948, dividends in arrears aggregated $18,299,138. As against these claims, there is no expectation of earnings and the total assets of Market Street as of June 30, 1948, were $3,432,670 before provision for tort and workmen's compensation claims and the claim of Standard as a creditor. It is clear, therefore, that the Prior Preference Stockholders are entitled to the residue of the assets and that the rights of all other stockholders should be terminated as provided in

the plan. Accordingly, we find the plan to be fair and equitable as it relates to the holders of all classes of stock of Market Street.

(3) Fairness to tort and workmen's compensation claimants.

As heretofore stated, there were as of June 30, 1948, 183 tort claims against Market Street seeking $2,543,772, and workmen's compensation estimated future costs of $34,351. The plan provides that the payment to Standard will be made immediately but that disposition of these claims will be made before any distribution to the Prior Preference stockholders.

The City and County of San Francisco, which made a final payment of $1,945,345.70 on May 7, 1948, to Market Street has instituted an action and secured a temporary injunction to restrain Market Street from using any of that sum for payments to its stockholders or Standard until adequate provision has been made for tort claimants. Before us the City urged that we should not issue any orders inconsistent with the temporary injunction. Since Market Street's assets at June 30, 1948, were more than sufficient to make the proposed payment to Standard and to cover the maximum amount of the tort claims at that date, and disposition is to be made of the claims before any distribution to stockholders, our approval of the plan would not adversely affect the City's suit or the court's order.

Fees and Expenses

William J. Cogan

It appears from the record that Cogan was primarily responsible for the development of the basic facts of the relationships between Market Street and Standard and the proposed settlement which is embodied in the plan before us. Despite this, we shall not approve any allowance for Cogan. From the record before us, the conclusion is inescapable that Cogan gave such attention to his personal interests and the fees which he hoped to secure, that his obligation of undivided loyalty to the stockholders whom he represented was not fulfilled. As will appear from the summary of the negotiations hereinafter set forth, before arriving at a settlement of the matters in controversy, Cogan attempted in the midst of negotiations to secure a retainer from Standard and established the amount of fees to be paid to him and made its payment a condition of the settlement.

Chronologically, the settlement negotiations were as follows: In June, 1947, Van Kirk met with Standard to discuss a settlement of the open account. Cogan testified that Van Kirk told him that Standard then made an offer of settlement involving a reduction in the open account by $250,000 and a payment to Cogan of $50,000 for attorney's fees. No further discussions were held by Cogan until September, 1947, at which time he was aware that Paulson's California co-counsel had discussed settlement with Standard's California counsel. On

September 23, 1947, Cogan indicated a willingness to receive a firm offer from Standard and an offer which called for a payment to Standard of $650,000 was then made by Standard. No action was taken by Cogan on this offer and the hearings continued.

At an accidental meeting with officers of Standard in Philadelphia in October, 1947, Cogan made an offer to Standard whereby he was willing to agree to a payment, in effect, of $350,000 to Standard "Provided it [Standard] paid me a counsel fee of $50,000 and paid the Committee a fee of $25,000." At this same meeting, Cogan requested that he be retained by Standard as counsel in other matters. While in oral argument before us, Cogan took the position that his request for retainer was made in jest, the record requires a contrary view. Thus, under cross-examination, Cogan testified as follows:

Q. Didn't you ask for a retainer?

A. Not in connection with that settlement.

Q. Tell us what you asked for about a retainer.

A. As far as any other matter was concerned, I said, "In case you don't want me as counsel against you on any other matter, perhaps you could give me a retainer."

It had nothing to do with the settlement.

Q. You said, "In case you don't want me as counsel against you in any other matter, perhaps you can give me a retainer"?

A. That is right.

Q. You meant an annual retainer?

A. I meant a retainer of any type.

Q. What type did you mean?

A. Well, annual retainer would be one type.

Q. Is that what you meant?

A. Or if they wanted to hire me for a particular case, it would be a retainer for that type. What I had in mind was retainer, money.

* * *

Q. It [the request for retainer] was made during a conversation when you were discussing settlement? A. That is right.

Standard did not accept Cogan's offer made at the October meeting. However, Cogan's terms at that meeting appear very significant. Although the parties were still $300,000 apart on what should be paid to Standard, Cogan specifically fixed his fee at the amount which he testified had previously been offered by Standard, and Cogan now demanded a fee of $25,000 for the Committee. In fact, according to his own testimony, Cogan "provided" that payment of these fees was a specific condition to the settlement which he was offering. From that time onward, the amount of the fees to be paid Cogan and the Van Kirk Committee were, in effect, a settled amount and were not the subject of further negotiation. All that remained was the settlement of the controversy itself. We find it unnecessary to speculate whether Cogan was then motivated only by the desire to secure a settlement which would be consonant with and sustain his fees or whether a more favorable settlement could have

been achieved, since we think it clear that he had so compromised his bargaining position that the Prior Preference Stockholders were no longer receiving the representation to which they were entitled. Thereafter, a determination by Cogan of the degree of pressure to be put on Standard was subject to consideration of what had become his personal stake. As will appear from the subsequent negotiations, Cogan and Van Kirk thereafter increased by $200,000 the amount which they previously had offered to Standard, and Standard in accepting that offer reduced by $100,000 its own previous offer of settlement.

The subsequent negotiations were as follows: In November, 1947, Standard's representatives met with Cogan in his office in New York and offered to settle on the basis of a payment of $650,000 to Standard and payments of $50,000 to Cogan and $25,000 to the Van Kirk Committee. Standard to pay half of these fees and Market Street to pay the balance. After discussions concerning this proposal with Van Kirk, Cogan made a counter-offer in writing the same day, embodying the same terms regarding the fee payments but providing for reduction of the payment to Standard from $650,000 to $550,000. Early in December, 1947, the Standard Board accepted this offer.

The Van Kirk Committee

After the close of the hearings the executor of Van Kirk's will wrote to us stating that he would be willing to accept $7,500 in lieu of the $25,000

provided for in the plan. The record shows that Van Kirk rendered valuable services over a considerable period of time. The payment of $7,500 to Van Kirk's estate will be approved. We have also given consideration to the question whether the other members of the Van Kirk Committee should be granted an allowance separately from Van Kirk. Since the record shows unequivocally that they as members of the Committee performed no service for the Prior Preference Stockholders of Market Street, we shall not approve an allowance for them.[12] We approve the provision in the plan that Market Street shall reimburse the Van Kirk Committee for expenses in an amount not exceeding $5,000. It appears that such expenses were for printing, travelling and similar items.

Milton Paulson

Paulson claims compensation for having contributed to the settlement of the claim of Standard. While he does not claim any specific amount, he contends that he and his associates are entitled to major credit for any benefits obtained by Market Street. Paulson and his associate counsel in San Francisco succeeded in intervening and filing an answer on behalf of Rosen in the action in the United States District Court in San Francisco

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[12]Cogan testified that it was contemplated that the major portion of any fees received by the Committee would be turned over to Van Kirk, since Van Kirk regarded the Committee as "his committee" and had advanced all of the funds for its operation.

brought by Standard on the open account at a time when Market Street had conceded all issues raised by the complaint of Standard except the amount of interest on the open account of Paulson or his representative participated in the investigatory hearings but did not play a major part therein. Paulson also claims to have been instrumental in starting the final settlement discussions between Cogan and representatives of Standard at a time when previous negotiations had been broken off. Paulson estimates that he devoted about four months to the proceedings. Associate counsel claim to have devoted nine weeks, and an accounting firm retained to investigate the facts spent about forty-three days.

Upon the basis of the record we do not think that Paulson is entitled to major credit for the final result but we do find that he made a contribution to the estate for which he should be compensated. We conclude that an allowance of $5,000 to Paulson for the services of himself and his associates to be paid by Market Street is fair and reasonable, assuming that the plan, amended in accordance with this Opinion, is consummated.

Flynn, Clerkin & Hansen

Flynn, Clerkin & Hansen, counsel for Standard, has requested an allowance of $10,000 for services rendered and to be rendered in these proceedings. This fee is to be paid by Standard and has been approved by it. Upon consideration of the evidence in the record regarding the services per-

formed, we see no objection to the payment of a fee in this amount.

Management of Market Street

The plan provides for a special meeting of Prior Preference Stockholders for the election of a new Board of Directors if the effective date of the plan does not occur before 100 days of the next regular meeting. While we customarily require appropriate election mechanics where shifts of voting power, as here, have occurred, we feel that the present case is not one which warrants the expenditure of money for that purpose. This estate will be under the jurisdiction of the enforcement court, assuming that the plan becomes finally effective, until the dissolution of the company. We think it sufficient in this instance if the next election of directors occurs at the first regular meeting held for that purpose after the plan has become effective. We shall also ask the Court to require quarterly reports from the management of the company as to the progress being made under the plan.

Enforcement of Plan

Market Street has requested that, upon the entry of our order approving the plan as necessary to effectuate the provisions of Section 11 (b) of the Act and fair and equitable to the persons affected thereby, we should apply to an appropriate District Court of the United States pursuant to Section 11 (e) of the Act and in accordance with the provisions of Section 18 (f) of the Act to enforce and carry

out the terms and provisions of the plan. We believe that within the framework of the plan as now constituted, partial distribtuions to stockholders may be made to the extent that the company has assets in excess of the amounts claimed under tort actions and workmen's compensation claims, and we shall ask the Court to direct such distributions from time to time when, in the discretion of the Court, such action is deemed proper. If the plan is modified in the manner indicated herein, we shall instruct our counsel to make an application to the appropriate Court for enforcement of the plan as modified.

Conclusions

For the reasons stated above, we have concluded that we can approve the plan filed by Market Street provided it is modified in conformity with the Findings and Opinion contained herein. If within thirty days from the date of these Findings and Opinion (or such additional time as may be granted upon a proper showing) the plan is so modified, an order will be entered approving it.

By the Commission (Chairman Hanrahan and Commissioners McEntire, McDonald, and Rowen.)

September 30, 1949.

[Seal] ORVAL L. DUBOIS,
Secretary.

EXHIBIT H

Amended Plan for Liquidation and Dissolution of Market Street Railway Company (a California Corporation)

Pursuant to the Provisions of Section 11 (e) of the Public Utility Holding Company Act of 1935, for the Purpose of Enabling Said Company to Comply With the Provisions of Section 11(b) of Said Act.

Introductory

For brevity, Market Street Railway Company, a California corporation, is referred to herein as "Market Street"; Standard Gas and Electric Company, a Delaware corporation, as "Standard"; the Securities and Exchange Commission as "the Commission"; the Public Utility Holding Company Act of 1935 as "the Act"; the District Court of the United States as "the Court"; and the Amended Plan hereinafter set forth as "the Amended Plan."

The full terms of the Amended Plan are hereinafter set forth under the heading "Provisions of the Amended Plan." For convenient reference, the Amended Plan is summarized in the several paragraphs immediately following. The Amended Plan will not become effective unless approved by the Securities and Exchange Commission and the Court of appropriate jurisdiction.

Summary of the Amended Plan

In brief, the Amended Plan provides for a settlement of the open account indebtedness owing by Market Street to Standard, the elimination of, or the termination of all rights of, the Preferred 6% Cumulative Stock, Second Preferred 6% Stock and Common Stock of Market Street, reduction of the remaining assets of Market Street to cash, disposition of all claims against Market Street through settlement or otherwise, including the actions now pending for injuries and damages and the claims for workmen's compensation and benefits arising from compensable injuries to or death of former employees, the liquidation of Market Street through distribution to the holders of its Prior Preference 6% Cumulative Stock of its assets remaining at the time of such liquidation and its dissolution.

Background

Prior to 1944 Market Street was engaged in the operation of a street railway system in and about the City of San Francisco, California. On September 29, 1944, Market Street sold and delivered its operative properties to the City and County of San Francisco for the sum of $7,500,000. An unaudited balance sheet of Market Street as of September 30, 1949, and a statement of Income and Deficit for the nine months ended September 30, 1949, are appended hereto.

Market Street has issued and there are now outstanding 116,185 shares of Prior Preference 6%

Cumulative Stock, par value $100 per share, (hereinafter sometimes referred to as "Prior Preference Stock"); 49,868½ shares of Preferred 6% Cumulative Stock, par value $100 per share, (hereinafter sometimes referred to as "Preferred Stock"); 46,737 shares of Second Preferred 6% Stock, par value $100 per share, (hereinafter sometimes referred to as "Second Preferred Stock"); and 106,474 shares of Common Stock, par value $100 per share. Standard is the owner of 39,250 shares of Preferred Stock, 25,500 shares of the Second Preferred Stock and 61,900 shares of Common Stock of Market Street. The shares of stock so owned by Standard constitute 39.67% of the voting securities of Market Street. Standard is a registered holding company under the Act. Market Street is a subsidiary of Standard. Cumulative dividends on the Prior Preference Stock of Market Street are in arrears from April 1, 1920, to December 31, 1921, and from January 1, 1924, to date; on September 30, 1949, the aggregate amount of such cumulative dividends in arrears was $165 per share or $19,170,-525. Cumulative dividends on the Preferred Stock of Market Street are in arrears from April 1, 1921, to date; on September 30, 1949, the aggregate amount of such cumulative dividends in arrears was $171 per share, or $8,527,513.50.

As of September 30, 1949, Market Street owed to Standard the sum of $1,026,249.34, representing the unpaid balance of its open account indebtedness, together with interest thereon computed at the rate of 4% per annum. There is presently pending in the

District Court of the United States for the Northern District of California, Southern Division, an action (Civil Action File No. 25807-R) brought by Standard against Market Street to recover the balance of the unpaid principal of such open account indebtedness, plus accrued interest thereon at the rate of 6% per annum, aggregating at September 30, 1949, the sum of $1,185,778.63, the difference of $159,529.29 resulting from Market Street having accrued interest at the rate of 4% per annum, whereas Standard accrued interest at the rate of 6% per annum. Russell M. Van Kirk, Bloomfield Hulick and Edmund T. Willetts, as a Protective Committee for the holders of Prior Preference Stock of Market Street (hereinafter referred to as the "Van Kirk Committee") have appeared in said action, and Lea Rosen, a holder of Prior Preference Stock, filed a petition for and was granted leave to intervene therein. Said action is now pending and undetermined.

Market Street and Standard and the Van Kirk Committee, after extended negotiations, have arrived at a settlement agreement which the Commission has found could be approved as follows:

(a) Market Street will pay to Standard the sum of $512,500 and will deliver to Standard a full and complete release and discharge of any and all liability of Standard and its subsidiaries to Market Street for any cause whatsoever.

(b) Standard will accept such sum of $512,500 in full payment of the open account indebtedness of Market Street to Standard and

any and all interest accrued thereon, and will deliver to Market Street a full and complete release and discharge of any and all liability of Market Street to Standard because of such open account indebtedness and for any other cause whatsoever.

(c) Coincident with such payment to Standard, Market Street will pay the Estate of Russell M. Van Kirk, Deceased, as fees or compensation, the sum of $7,500. Market Street will also reimburse the Van Kirk Committee for expenses in an amount not exceeding the sum of $5,000.

(d) Coincident with such payment to Standard, Market Street will pay to Milton Paulson, attorney for Lea Rosen, a holder of Prior Preference Stock, for his fees and the services of his associates the total sum of $5,000. Market Street will also reimburse said Milton Paulson for his expenses in connection therewith in an amount not exceeding the sum of $250.

As of September 30, 1949, there were pending against Market Street 77 actions for injuries and damages praying for judgments in the aggregate amount of $944,126.92. There were also pending certain claims for compensation and benefits arising from compensable injuries and death of former employees of Market Street in accordance with the Workmen's Compensation Laws of the State of California.

Injunction Action Brought by City and County of San Francisco against Market Street

On May 7, 1948, the City and County of San Francisco paid to Market Street the sum of $1,945,345.70, being the balance of principal and interest remaining unpaid of the purchase price of Market Street's operative properties. On said date an action was commenced by the City and County of San Francisco against Market Street and its directors and officers for an injunction to enjoin the distribution of the sum paid as aforesaid. Said action was instituted in the Superior Court of the State of California, in and for the City and County of San Francisco, and is numbered therein 375962. On June 9, 1948, the Court in said action ordered the issuance of a temporary injunction enjoining and restraining Market Street and its officers from distributing or paying to its stockholders, or any of them, as a liquidating dividend, or otherwise, the money paid by the City and County of San Francisco to Market Street on the 7th day of May, 1948, or any part thereof, until adequate provision is made, with the approval of said Superior Court, for the payment by Market Street of any or all judgments which may be rendered against it in any pending actions for injuries and damages already on file or similar causes of action which have not been filed. Market Street and its officers were further enjoined thereby from paying out of said sum any amount of money to Standard in settlement of the litigation instituted by Standard, or to its attorney

or representative or agent, until the rights of the City and County of San Francisco and those for whom said action was prosecuted can be heard and determined therein. Thereafter a writ of temporary injunction pursuant to said order was issued and served in said action. An appeal to the Supreme Court of the State of California from said order was duly taken and perfected and the same is now pending in The District Court of Appeal of the State of California, First Appellate District. (On October 15, 1948, the Supreme Court of California ordered the appeal transferred to the latter Court.) On October 24, 1949, said appeal was argued and submitted for decision to said District Court of Appeal, Division One thereof.

Derivative Action Brought on Behalf of Market Street Against Standard Power and Light Corporation

On October 14, 1949, an action was filed in the District Court of the United States, District of New Jersey, entitled "Charles T. Jones, individually as a stockholder of Market Street Railway Company, and Bloomfield Hulick and Edmund T. Willetts, as a Prior Preference Stockholders Committee of Market Street Railway Company, suing in behalf of themselves and all other stockholders similarly situated, and in the right of Market Street Railway Company, Plaintiffs, vs. Standard Power & Light Corporation, Defendant," File No. 795-49. This action is brought to recover on behalf of Market Street the sum of $270,000, together with interest.

costs and disbursements and a reasonable counsel fee for the attorney for plaintiffs. In the bill of complaint filed therein, it is alleged that, pursuant to a written contract dated on or about March 22, 1926, between Standard, H. M. Byllesby & Co. and Ladenburg Thalmann, Market Street was charged management fees for the years 1926 to 1929, inclusive, in the sum of $675,000, and that 40% thereof was received by said defendant, Standard Power and Light Corporation, as profits from Market Street management fees, and that Standard Power and Light Corporation was unjustly enriched in the sum of $270,000 to the damage and detriment of Market Street.

Provisions of the Amended Plan

Market Street will wind up and liquidate its affairs as follows:

(1) Make payment to Standard in settlement of the open account indebtedness and the action brought thereon upon the basis outlined above.

(2) Sell its remaining office furniture and fixtures.

(3) Dispose of all claims including the actions for injuries and damages pending against it.

(4) Dispose of claims for workmen's compensation and benefits.

(5) Distribute all remaining assets on a pro rata basis to the holders of its Prior Preference Stock as hereinabove provided.

(6) Dissolve.

On the effective date of the Amended Plan, to be fixed as hereinafter provided, all rights of the holders of the Preferred Stock, Second Preferred Stock and Common Stock of Market Street shall thereupon cease and terminate, and the holders of such Preferred Stock, Second Preferred Stock and Common Stock shall have no further rights with respect to the voting of such stock or to participate in any distribution of the assets of Market Street upon liquidation.

The payment of fees, compensation and expenses in connection with the Amended Plan shall be subject to the approval of the Commission, and Market Street will pay such fees, compensation and expenses as shall be approved by the Commission.

Method of Carrying the Amended Plan into Effect

Market Street has filed with the Commission an application to it requesting that the Commission find the Amended Plan necessary to effectuate the provisions of Subsection (b) of Section 11 of the Act, and fair and equitable to the persons affected by the Amended Plan; that the Commission make an order approving the Amended Plan; and that the Commission apply to the Court in accordance with the provisions of Subsection (f) of Section 18 of the Act as set forth in Section 11(e) thereof, to

enforce and carry out the terms and provisions of the Amended Plan.

Effective Date

The effective date of the Amended Plan shall be a date to be fixed by the Court. Market Street will propose to the Court an effective date not later than thirty days after entry by the Court of its enforcement order or decree, provided that there is no stay of such order or decree. As soon as practicable after the effective date of the Amended Plan, Market Street will proceed with the consummation thereof.

At appropriate times the requisite corporate action to carry out the Amended Plan and the orders of the Commission and the Court with respect thereto shall be taken by the Board of Directors.

At least ten days prior to the effective date of the Amended Plan Market Street will mail a notice of such effective date to each holder of Prior Preference Stock of Market Street of record at the close of business on a date not earlier than the tenth day preceding such notice, and will cause such notice to be published once in a daily newspaper in each of the Cities of San Francisco, California; Chicago, Illinois; and New York, New York.

Settlement of Indebtedness to Standard and Payment of Fees and Expenses Specifically Provided for in Amended Plan

On or immediately following the effective date of the Amended Plan Market Street will settle its open account indebtedness to Standard in the man-

ner provided for in the Amended Plan, and will pay fees and expenses to the Estate of Russell M. Van Kirk, Deceased, the Van Kirk Committee and Milton Paulson in the amounts provided for in the Amended Plan.

Partial Distribution of Assets to Prior Preference Stockholders

On the effective date of the Amended Plan, or as soon as practicable thereafter, Market Street will make, or cause to be made, a pro rata partial distribution of its assets to the holders of the outstanding shares of its Prior Preference Stock. The amount of such partial distribution will be not less than $9 per share and may exceed such amount, depending upon the extent to which Market Street has available therefor assets not then required for the possible satisfaction of pending claims and which Market Street is not restrained by injunction from distributing to its stockholders. When the amount of such partial distribution of assets has been determined, the funds required for the payment thereof shall be deposited with paying agents in San Francisco, California, and in New York, New York, to be selected by Market Street with the approval of the Court. Notice of such partial distribution of assets and that the funds therefor are available at the respective offices of such paying agents, shall be given at least ten days prior to the initial date on which such partial distribution shall be available to Prior Preference stockholders, by mail to the holders of the Prior Preference Stock of Market

Street at each stockholder's respective address as shown by the records of Market Street at the close of business on a date not earlier than the tenth day preceding such notice, and by publication once in a daily newspaper published in each of the Cities of San Francisco, California; New York, New York; and Chicago, Illinois.

Such partial distribution of assets shall be made by such paying agents only upon the presentation to them of the certificate or certificates for such shares of Prior Preference Stock of Market Street and upon the stamping, printing or affixing thereon by the paying agent of a legend showing the amount and date of such payment.

Meeting of Stockholders

After the effective date of the Amended Plan regular annual meetings of the stockholders then entitled to vote pursuant to the Amended Plan for the election of directors shall be held as provided in the By-Laws of Market Street and the laws of the State of California, and the directors so elected from time to time shall carry out the provisions of the Amended Plan, subject to the jurisdiction and orders of the Court.

Employees and Salaries

No new employment contracts, or renewals of existing employment contracts upon their expiration, other than on a month to month basis, shall be made, except upon notice to the Commission and

the Court and with approval by the Court. No new or additional employees (other than employees who are to receive a monthly salary not in excess of $400) shall be hired, except on notice to the Commission and the Court and with approval by the Court. The salary or compensation of any person regularly employed by the Company shall not be increased to an amount in excess of four hundred dollars per month, except upon notice to the Commission and the Court and with approval by the Court. The President and General Manager of Market Street, Mr. Samuel Kahn, has informed Market Street that he desires to and will terminate his services with Market Street at the expiration of his present contract on August 1, 1950.

Periodic Reports

From and after the effective date of the Amended Plan and until an order of discharge has been entered by the Court, as hereinafter provided, Market Street will submit to the Commission and to the Court quarterly reports with respect to the affairs of Market Street and the steps taken in the consummation of the Amended Plan during said quarter, including specifically a statement of the number of claims or actions disposed of, the cost thereof, and the number of claims and actions pending and the amount of damages claimed therein.

Final Distribution of Assets

Upon consummation of steps (1), (2), (3) and (4) of the "Provisions of the Amended Plan," the

assets of Market Street then remaining, after appropriate provision for the payment of fees and expenses, shall be distributed ratably to the holders of the outstanding Prior Preference Stock of Market Street.

At least ten days' and not more than twenty days' notice of the date fixed for the payment of such final distribution of assets shall be given by publication in newspapers published in San Francisco, California; New York, New York, and Chicago Illinois, and by mail to such Prior Preference stockholders as their addresses appear on the records of Market Street as of a date not earlier than the tenth day preceding such notice. The stock transfer books of Market Street, with respect to such Prior Preference Stock, shall be closed finally as of the close of business of the day preceding the date upon which payment of such final distribution of assets will be made and no further transfers of such stock will be made thereafter.

The funds required for the payment of the final distribution of assets shall be deposited with the paying agents located in San Francisco, California, and in New York, New York, theretofore designated as the paying agents for the Partial Distribution of Assets, and shall be distributed by them ratably to such holders of the outstanding Prior Preference Stock upon the presentation and surrender to them of the certificate or certificates for such shares of Prior Preference Stock.

Unclaimed Distributive Shares of Assets

The unclaimed funds deposited for payment of the partial distribution and the final distribution of assets shall be held by such paying agents for a period of six months from the date fixed for the payment of such final distribution of assets and shall be available for disbursement during that period upon the surrender of the certificates for such Prior Preference Stock.

At the end of such six months' period, Market Street shall direct the New York paying agent to transmit the balance of the amount deposited with it, either as the partial distribution of assets or the final distribution of assets, to the paying agent in San Francisco, California, to be held by it in trust for three years for the benefit of the holders of such Prior Preference Stock who have not theretofore claimed same or surrendered the certificates for their stock and received the amount to which they were entitled.

Within thirty days after the making of such deposit with the San Francisco paying agent, a notice shall be sent by such paying agent to each Prior Preference stockholder who has not surrendered the certificate or certificates for the shares of Stock owned by him, at his last known address, advising him of the deposit of such funds with such paying agent and the manner and method by which he may obtain his respective distributive share thereof, and thereafter a similar notice shall be sent to each such stockholder at least thirty days and not more

than sixty days before the end of each of the three twelve month periods following the making of such deposit.

In addition to and about the time of the mailing of such notice to the holders of Prior Preference Stock, the paying agent shall cause similar notices to be published in San Francisco, California; New York, New York, and Chicago, Illinois, newspapers.

Commencing with the last twelve months of the three year period during which such funds shall be on deposit with such paying agent, said paying agent shall expend reasonable amounts, within its discretion, of the funds in its possession for the purpose of locating persons believed to be entitled to such funds or a part thereof.

With respect to the funds unclaimed by holders of the Prior Preference Stock within three years from the time of such deposit with the San Francisco paying agent, the funds so unclaimed shall be distributed promptly upon the expiration of such three year period by such paying agent pro rata among those persons who shall have theretofore surrendered certificates for shares of the Prior Preference Stock.

Dissolution

When the Amended Plan has been consummated and Market Street has been completely wound up, a majority of the Board of Directors of Market Street will sign and acknowledge and will file with the Secretary of State of the State of California a

certificate of winding up and dissolution and will file a copy thereof in the office of the County Clerk of the county in which the principal office of Market Street is located.

Market Street Applications to the Court

Market Street may from time to time make application to the Court for such orders as Market Street may deem necessary or appropriate to the consummation of the Amended Plan.

After compliance with and consummation of the terms and provisions of the Amended Plan, application will be made to the Court for an order discharging Market Street and its assets from the jurisdiction of the Court.

Dated: December 8, 1949.

Market Street Railway Company
Balance Sheet, September 30, 1949

Assets

Current Assets:		
Cash on hand and in banks $	83,261.24	
United States Government securities, at face value	3,000,000.00	
Accrued interest and other receivables	22,902.26	
Total current assets		$3,106,163.50
Furniture and Fixtures, at Appraisal Value		4,846.33
Deposits:		
Collateral security for self-insurance under the Workmen's Compensation Insurance and Safety Act $	62,935.88	
Other deposits	1,000.00	
Total deposits		63,935.88
Deferred Charges		90.91
Total		$3,175,036.62

Liabilities

Current Liabilities:		
Accounts payable	$ 1,327.11	
Other current liabilities	2,453.07	
Total current liabilities		$ 3,780.18
Indebtedness to Affiliate—Standard Gas and Electric Company, Incorporated		1,026,249.34
Unredeemed Bonded Indebtedness and Bond Interest Coupons:		
First mortgage 5% sinking fund gold bonds due April 1, 1945, called for redemption October 1, 1944	$ 6,000.00	
Bonds and script of previous issues	1,196.57	
Matured bond interest coupons	4,328.75	
Total	$ 11,525.32	
Less cash deposited with trustee	11,525.32	
Option Deposit (see Note 1)		20,000.00
Capital:		
Capital stock (see Note 3):		
Prior preference 6% cumulative—Authorized, 117,500 shares of $100.00 par value each; outstanding, 116,185 shares	$11,618,500.00	
Preferred 6% cumulative—Authorized, 50,000 shares of $100.00 par value each; outstanding, 49,868½ shares	4,986,850.00	
Second preferred 6%—Authorized, 47,000 shares of $100.00 par value each; outstanding, 46737 shares	4,673,700.00	
Common—Authorized, 107,000 shares of $100.00 par value each; outstanding, 106,474 shares	10,647,400.00	
Total capital stock	$31,926,450.00	
Less deficit	29,801,442.90	
Net capital (see Note 2)		2,125,007.10
Total		$3,175,036.62

[See page 85 for footnotes.]

Market Street Railway Company
Footnotes to Balance Sheet, September 30, 1949

1. On September 20, 1947, in consideration of the payment of $20,000, Market Street granted an option to purchase a parcel of its real estate. The depositor failed to exercise the option and Market Street considered the deposit forfeited. On April 16, 1948, an action was brought in the Superior Court of the State of California, in and for the City and County of San Francisco, to recover said deposit. Said action is entitled "Timothy S. Sheehan, Plaintiff, vs. Market Street Railway Company, Defendant," and is numbered 375341. On August 1, 1949, judgment was entered in said action in favor of Market Street. Plaintiff's motion for new trial in said action has been denied. An appeal from said judgment was duly taken and perfected and the same is now pending in The District Court of Appeal of the State of California, First Appellate District.

2. By "Notice of Determination Under the Sales and Use Tax Law," dated February 4, 1949, the State Board of Equalization of the State of California proposed an assessment against Market Street of sales and use tax, interest and penalties amounting to the sum of $102,759.09. Practically all of the proposed assessment involved tangible personal property included in the sale to the City and County of San Francisco of Market Street's business and operative properties on September 29, 1944. A petition for redetermination of such proposed assessment has been filed and is now awaiting a hearing thereon by the State Board of Equalization.

3. Cumulative dividends are in arrears on Prior Preference Stock from April 1, 1920, to December 31, 1921, and from January 1, 1924, to September 30, 1949, in the aggregate amount of $19,170,525, and on the Preferred Stock from April 1, 1921, to September 30, 1949, in the aggregate amount of $8,527,513.50.

Market Street Railway Company
Statement of Income and Deficit for the
Nine Months Ended September 30, 1949

Non-Operating Income—Interest		$ 28,954.10
Non-Operating Expense:		
Cost of injuries and damages claims and all expenses connected therewith	$109,335.82	
General and administrative expense	59,217.06	
Interest expense	21,157.59	
Taxes	549.10	
Total non-operating expense		190,259.57
Net Loss		$ 161,305.47
Deficit, January 1, 1949		29,640,137.43
Deficit, October 1, 1949		$29,801,442.90

EXHIBIT J

For Immediate Release Friday, March 10, 1950
Securities and Exchange Commission
Washington, D. C.

Holding Company Act of 1935
Release No. 9718

In the Matter of
MARKET STREET RAILWAY COMPANY

File No. 54-169

MARKET STREET RAILWAY COMPANY, AND STANDARD GAS AND ELECTRIC COMPANY, AND CERTAIN OF ITS SUBSIDIARY COMPANIES

File No. 4-63

RUSSELL M. VAN KIRK, BLOOMFIELD HULICK, EDMUND T. WILLETTS, COMMITTEE FOR THE MARKET STREET RAILWAY COMPANY PRIOR PREFERENCE CAPITAL TOCK

File No. 68-84
(Public Utility Holding Company Act of 1935)

SUPPLEMENTAL FINDINGS AND OPINION OF THE COMMISSION

Market Street Railway Company ("Market Street"), a non-utility subsidiary of Standard Gas and Electric Company ("Standard Gas"), a registered holding company, filed, pursuant to Section 11 (e) of the Public Utility Holding Company Act

of 1935, a plan involving the settlement of a claim asserted by Standard Gas against Market Street and the subsequent liquidation and dissolution of Market Street. Proceedings on the plan were consolidated with investigation proceedings previously instituted by us pursuant to Sections 11 (a), 18 (a) and 18 (b) of the Act with respect to the relationships and transactions between Market Street, Standard Gas and Byllesby Engineering and Management Corporation ("Byllesby Engineering"), formerly a service company in the Standard Gas system. During the course of the investigation Russell M. Van Kirk, Bloomfield Hulick and Edmund T. Willetts, acting as a committee ("Van Kirk Committee") for the holders of Prior Preference 6% Cumulative Stock of Market Street, and Standard Gas had reached a settlement of the claim, and that settlement was reflected in the Section 11 (e) plan. On September 30, 1949, we issued our Findings and Opinion (Holding Company Act Release No. 9376) stating that we could approve the plan if it were amended, among other things, to provide for settlement of the "matters in controversy" by the payment of $512,500 by Market Street to Standard Gas.[1] We also found that be-

[1]According to the books of Standard Gas, Market Street owed it $1,132,691 as of June 30, 1948, on open account; according to the books of Market Street the amount owing was $990,832 as of the same date. Standard Gas is accruing interest at the rate of 6% on the open account, but Market Street, pursuant to an order of the California Railroad Commission, reduced the interest rate from 6% to

cause of certain activities of William J. Cogan, who acted as attorney for the Van Kirk Committee, we could not approve the provisions of the plan which provided for the payment of an allowance for his services.

Market Street thereafter filed an amended plan which provides for payment to Standard Gas of $512,500. The amended plan also recites than on October 14, 1949 (subsequent to the issuance of our Findings and Opinion) the surviving members of the Van Kirk Committee and an individual stockholder of Market Street, through Cogan as their attorney, instituted an action in the United States District Court of the District of New Jersey against Standard Power & Light Corporation ("Standard Power") seeking to recover on behalf of Market Street $270,000 with interest, alleging that Standard Power was unjustly enriched in this amount by reason of the receipt by it of part of certain management fees charged Market Street for the years 1926 through 1929. Standard Power is at present a parent of Standard Gas, but during the years in question it was a subsidiary of Standard Gas. The amended plan provides: "Market Street will pay to Standard [Gas] the sum of $512,500 and will deliver to Standard [Gas] a full and complete release and discharge of any and all liability of Standard [Gas] and its subsidiaries to Market

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4% on October 24, 1939. See Market Street Railway Company, ... S. E. C. .... (1949), Holding Company Act Release No. 9376, p. 4.

Street for any cause whatsoever." The only changes in this provision from the plan as originally filed consist of a revision of the amount to be paid by Market Street and the addition of the words "and its subsidiaries." The amended plan also contains detailed provisions relating to the method of carrying it out which were not contained in the original plan.

We issued an order to show cause why the amended plan should not be approved (Holding Company Act Release No. 9597). Upon the return of that order the only questions raised related to our findings regarding allowances for services and the effect of the quoted language upon the claim asserted on behalf of Market Street against Standard Power in the legal action mentioned above.[2]

Cogan has requested that we review our Findings and Opinion insofar as they relate to the question of allowances for services rendered by him as counsel for the Van Kirk Committee, by the Committee itself, and by Milton Paulson as counsel for a holder of prior preference stock of Market Street. Paulson has made a similar request with respect to his fee. We have carefully considered these requests and the contentions made in support of them and have concluded that no adequate basis has been presented which would warrant any change in our determinations with respect to the allowance of fees. We therefore deny the requests.

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[2]No question has been raised regarding the provisions inserted in the amended plan with respect to the mechanics of carrying it out.

Standard Power, appearing for the first time in these proceedings in response to the order to show cause, took the position that the intended effect of the amended plan should be made clear and stated that, if the proposed release would discharge Standard Power, it favored the amended plan; if not, it was opposed to it. Counsel for Standard Gas indicated that, in his view, the proposed settlement—which is substantially the same as the settlement originally arrived at and reflected in the original plan except that it eliminates amounts which were to have been paid as counsel and committee fees—was intended to dispose of the entire question of alleged overcharges by Byllesby Engineering. Cogan, who, as counsel for the Van Kirk Committee, participated in the settlement negotiations with representatives of Standard Gas, stated that in his view the settlement was intended to cover only the open account due from Market Street to Standard Gas and not the overcharges for service fees generally. He pointed out that the terms of the settlement as first submitted to this Commission, before the formulation of a Section 11 (e) plan, contained no reference to a release. He contended that, while the service charges for the years 1926 through 1929 were considered in our investigation proceedings, they were not reflected in the open account, which was made up of charges and credits entered in 1931 and subsequent years, and consequently did not figure in the settlement negotiations. He also emphasized that during the 1926-1929 period Standard Gas had only a 50% interest in Standard Power.

Market Street, which did not participate in arriving at the settlement or in formulating the terms of the plan, has not expressed an opinion as to whether it is intended that consummation of the amended plan will discharge Standard Power.

Whatever may be the present disagreement between Cogan and Standard Gas as to what each intended in their negotiations and their eventual settlement, their settlement was not accepted by us as a reason for approving the payment by Market Street to Standard Gas in the amount which we indicated in our prior Opinion could be found to be fair and equitable. In view of Cogan's activities we found it necessary in our prior Opinion to state that we were not accepting Cogan's negotiations as an indicium of fairness and pointed out that we had the duty to appraise the proposed payment independently. Thus, in considering the plan, we had before us what constituted, in effect, an offer of settlement made unilaterally by Market Street as the proponent of a plan for its own dissolution. We were required under the circumstances of the case to treat that offer in the framework of the whole record then before us just as if there had been no agreement between stockholders of Market Street and Standard Gas.[3] The record before us embraced not only the hearings on the plan but a public in-

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[3]Cf. North American Light & Power Company, et al., ... S. E. C. .... (1947), Holding Company Act Release No. 7514, plan approved and enforced, 74 F. Supp. 317 (D. Del., 1947), affirmed, 170 F. 2d 924 (C. A. 3, 1948).

vestigation into relationships and transactions between Market Street, Standard Gas and Byllesby Engineering. An important objective of the investigation was the examination and analysis of the service charges paid by Market Street during the entire period of its history as a company in the Standard Gas system. The record establishes that Cogan, who now takes the position that he intended only to settle service charges reflected in the open account after 1930, put into evidence numerous documents and schedules and a mass of correspondence relating to the whole period from 1926 to 1935 and that most of this material was secured by Cogan as a result of subpoenas which we issued at his request. In addition, the service charges during the entire period were the subject of attack by a prior preference stockholder who intervened in an action instituted by Standard Gas against Market Street on the open account claim and who was also a participant in these proceedings. Neither we nor the Court in that action, to which the settlement was presented before the plan was filed, was informed that any participant in the proceedings was reserving the right to make any part of the service charges the subject of independent proceedings. Although the settlement was reached before Standard Gas presented its case, it may nevertheless be noted that, so far as the record covered the point, Standard Gas made no disclaimer of responsibility for any of the charges made by Byllesby Engineering, which was a subsidiary of Standard Gas throughout the entire period.

In reaching the conclusion in our earlier Findings and Opinion that we could approve a settlement of $512,500 as falling within the realm of fairness, we considered all the service fees paid by Market Street to Byllesby Engineering from 1926 to 1935. This is evident from our Findings and Opinion where, in particular, we listed all the fees charged from 1926 onwards, noted their apparent excessiveness, and pointed out that $270,000 of such fees was paid over by Byllesby Engineering not to its own parent, Standard Gas, but to Standard Power, which, as we have stated, was also a subsidiary of Standard Gas from 1926 to 1930.[4]

In summary, therefore, whether or not Cogan intended in his negotiations with Standard Gas to settle all claims which Market Street might have against Standard Gas and its subsidiaries, past and present,[5] we treated the plan as one which was offered to resolve all controversies between Market Street and Standard Gas and its subsidiaries, past

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[4]At the hearing on the order to show cause, there were placed in evidence the contracts pursuant to which the payments to Standard Power were made by Byllesby Engineering. These contracts have furnished the reason for such payments but have added nothing to what was previously before us as to the effect of the service charges on Market Street and the significance which we gave to the service charges generally.

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[5]Until the most recent hearing Cogan never disclosed that he had intended to arrange a settlement with Standard Gas whereby he would attempt to preserve claims against Standard Power.

and present, including Standard Power, as a step in the final winding up and dissolution of Market Street, and it was on such basis that we found the payment of $512,500 to be fair and equitable. Accordingly, we believe the plan should now be amended to provide clearly for a complete release of Standard Gas and its subsidiaries, including Standard Power. If the plan is so amended within 15 days (or such later period as may be granted for good cause shown) we shall enter an order of approval. If the plan is not so amended within the time stated, we shall take such action as may be appropriate.

By the Commission (Chairman McDonald and Commissioners McEntire, Rowen, Cook, and McCormick).

[Seal] ORVAL L. DuBOIS,
Secretary.

March 9, 1950.

EXHIBIT L

United States of America
Before the Securities and Exchange Commission

In the Matter of
MARKET STREET RAILWAY COMPANY,
File No. 54-169

MARKET STREET RAILWAY COMPANY AND STANDARD GAS AND ELECTRIC COMPANY and Certain of Its Subsidiary Companies,
File No. 4-63

RUSSELL M. VAN KIRK, BLOOMFIELD HULICK, EDMUND T. WILLETTS, Committee for the Market Street Railway Company Prior Preference Capital Stock,
File No. 68-84

(Public Utility Holding Company Act of 1935)

AMENDMENT No. 1 OF THE AMENDED PLAN FOR LIQUIDATION AND DISSOLUTION OF MARKET STREET RAILWAY COMPANY DATED DECEMBER 8, 1949

Market Street Railway Company, a California corporation, on the basis of the Supplemental Findings and Opinion of the Securities and Exchange Commission dated March 9, 1950, as contained in Holding Company Act Release No. 9718, which release is incorporated herein by reference, hereby amends its Amended Plan for Liquidation and Dissolution dated December 8, 1949, heretofore filed

by it pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935 providing, among other things, for its liquidation and dissolution and the settlement of a claim asserted by Standard Gas and Electric Company against it, by striking and deleting from said Amended Plan the paragraph thereof reading as follows:

> "Market Street will pay to Standard the sum of $512,500 and will deliver to Standard a full and complete release and discharge of any and all liability of Standard and its subsidiaries to Market Street for any cause whatsoever,"

and by substituting therefor and in lieu thereof a new paragraph reading as follows:

> "Market Street will pay to Standard the sum of $512,500 and will concurrently deliver to Standard a full and complete release and discharge of any and all liability, past or present, of Standard and its subsidiaries, including Standard Power and Light Corporation, a Delaware corporation, (presently the parent of Standard) to Market Street for any cause whatsoever."

MARKET STREET RAILWAY COMPANY,

By /s/ B. GRAHAM,
President.

Attest:

/s/ DOUGLASS NEWMAN,
Assistant Secretary.

State of New York,
City and County of New York—ss.

The undersigned, being duly sworn, deposes and says that he has duly executed the foregoing instrument for and in behalf of Market Street Railway Company, a California corporation; that he is the President of said Company; and that all action by directors necessary to authorize deponent to execute and file such instrument has been taken. Deponent further says that he is familiar with such instrument and the transactions referred to therein and that to the best of his knowledge, information and belief, the statements made therein are true.

B. GRAHAM.

Subscribed and Sworn to before me this 3rd day of May, 1950.

JOSEPH W. POLITO,
Notary Public in and for the City and County Aforesaid.

EXHIBIT M

United States of America
Before the Securities and Exchange Commission

At a regular session of the Securities and Exchange Commission, held at its office in the City of Washington, D. C., on the 3rd day of May, 1950.

In the Matter of
MARKET STREET RAILWAY COMPANY,
File No. 54-169

MARKET STREET RAILWAY COMPANY, AND STANDARD GAS AND ELECTRIC COMPANY, and Certain of Its Subsidiary Companies,
File No. 4-63

RUSSELL M. VAN KIRK, BLOOMFIELD HULICK, EDMUND T. WILLETTS, Committee for the Market Street Railway Company Prior Preference Capital Stock,
File No. 68-84

(Public Utility Holding Company Act of 1935)

ORDER APPROVING PLAN UNDER SECTION 11(e)

The Commission having on August 8, 1941, entered an order (File No. 59-9) under Section 11(b)(1) of the Public Utility Holding Company Act of 1935 ("Act"), directing Standard Gas and Electric Company ("Standard Gas"), a registered holding company, and itself a subsidiary of Standard Power and Light Corporation ("Standard

Power"), a registered holding company, to sever its relationship with Market Street Railway Company ("Market Street"), a non-utility subsidiary of Standard Gas, by disposing or causing the disposition of its direct and indirect ownership, control and holding of securities issued by Market Street; and

Market Street having filed an application (File No. 54-169), pursuant to Section 11(e) of the Act and other applicable provisions thereof, for approval of a plan involving the settlement of a claim asserted by Standard Gas against Market Street and the subsequent liquidation and dissolution of Market Street; and

Public hearings having been duly held after appropriate notice, at which hearings all interested persons were afforded an opportunity to be heard; and

The Commission having heard oral argument, having considered the briefs of the participants and the record in the matter, and having filed its Findings and Opinion hereon on September 30, 1949 (Holding Company Act Release No. 9376), finding that such a plan is necessary to effectuate the provisions of Section 11(b) of the Act and that such plan would be fair and equitable to all persons affected thereby if amended in certain respects as set forth in said Findings and Opinion; and

Market Street having, on December 8, 1949, in accordance with the aforesaid Findings and Opinion of the Commission, filed its Amended Plan for Liquidation and Dissolution of Market Street ("Amended Plan") modifying such plan; and

The Commission having, on January 6, 1950, issued an order to show cause why the Amended Plan should not be approved (Holding Company Act Release No. 9597), and a hearing having been held on January 16, 1950, at which all interested persons were afforded an opportunity to show cause why such Amended Plan should not be approved; and

The Commission having thereafter considered the entire record in the matter and having filed its Supplemental Findings and Opinion thereon on March 9, 1950, concluding that the Amended Plan, if modified in certain respects set forth in such Supplemental Findings and Opinion, would be found to be necessary and appropriate to effectuate the provisions of Section 11(b) of the Act and fair and equitable to the persons affected thereby; and

Market Street having, on May 3, 1950, in accordance with the aforesaid Supplemental Findings and Opinion of the Commission, filed Amendment No. 1 to its Amended Plan modifying said Amended Plan; and

Market Street having requested that the Commission enter an order reciting that the transactions proposed in the Amended Plan, as modified, are necessary and appropriate to effectuate the provisions of Section 11(b) of the Act and are fair and equitable to the persons affected thereby, and that such order contain recitals in accordance with the requirements of the Internal Revenue Code, as amended, including Sections 371 and 1808(f); and

Market Street having further requested the Commission, pursuant to Section 11(e) of the Act, to apply to an appropriate court, in accordance with the provisions of Section 18(f) of the Act, to enforce and carry out the terms and provisions of the Amended Plan, as modified:

It Is Found, in accordance with said Findings and Opinion dated September 30, 1949, and said Supplemental Findings and Opinion dated March 9, 1950, that said Amended Plan, as modified, is necessary to effectuate the provisions of Section 11(b) of the Act, and fair and equitable to the persons affected thereby.

It Is Ordered, pursuant to Section 11(e) and other applicable provisions of the Act, that said Amended Plan, as modified, be, and it hereby is, approved, effective forthwith, subject to the terms and conditions contained in Rule U-24 and to the following additional terms and conditions and reservations of jurisdiction:

1. That the order entered herein shall not be operative to authorize the consummation of the transactions proposed in the Amended Plan, as modified, until an appropriate United States District Court shall, upon application thereto, enter an order enforcing said Amended Plan, as modified;

2. That jurisdiction be, and hereby is, specifically reserved to determine the reasonableness and appropriate allocation of all fees and expenses and other remuneration incurred or to be incurred in connection with said Amended Plan, as modified,

and the transactions incident thereto, except as to those fees and expenses heretofore specifically approved in the Commission's Findings and Opinion dated September 30, 1949, and Supplemental Findings and Opinion dated March 9, 1950;

3. That jurisdiction be, and hereby is, reserved to consider further or additional requests for and to make, appropriate tax recitals and findings; and

4. That jurisdiction be, and hereby is, specifically reserved to entertain such further proceedings, to make such supplemental findings, and to take such further action as may be necessary in connection with the Amended Plan, as modified, the transactions incident thereto, and the consummation thereof.

Certain motions by counsel herein having been presented to the Commission for ruling thereon:

It Is Further Ordered that the motions of William J. Cogan, Esq., and Milton Paulson, Esq., that the Commission modify its Findings and Opinion dated September 30, 1949, in so far as the same relates to the question of allowances for services rendered in these proceedings, be, and the same hereby are, denied.

By the Commission.

ORVAL L. DuBOIS,
Secretary.

[Endorsed]: Filed May 3, 1950, U.S.D.C.

District Court of the United States, Northern District of California, Southern Division

Civil Action—File No. 29723

In the Matter of
MARKET STREET RAILWAY COMPANY

STATEMENT OF OBJECTIONS

Charles T. Jones, holder and owner of shares of prior preference capital stock of Market Street Railway Company, opposes the plan of reorganization of Market Street Railway Company, as amended, and as modified, filed herein on May 3, 1950, and opposes the application to this Court for approval and enforcement thereof, made by Securities and Exchange Commission on May 3, 1950, together with the Findings and Opinion dated September 30, 1949, the Supplemental Findings and Opinion dated March 8, 1950, and the Order dated May 3, 1950, respectively, made by Securities and Exchange Commission.

With respect to the Findings and Opinion of the Securities and Exchange Commission dated September 30, 1949, he says:

1. The finding (p. 7), "During the course of those proceedings, both Cogan and Paulson separately initiated negotiations with Standard for a settlement of the open-account controversy"—is in error. The record shows that Cogan at no time initiated negotiations with Standard.

2. The finding (p. 7), "It appears from the record that Standard wished, if possible, to negotiate with Cogan and Paulson jointly, which was agreeable to Paulson but not to Cogan"—is only partly true, is misleading and not generally supported by the record.

3. The finding (p. 7), "Standard finally conducted negotiations solely with Cogan, who represented 36,500 shares"—is only partly true, is misleading.

* * *

29. The finding (p. 13), "From the record before us, the conclusion is inescapable that Cogan gave such attention to his personal interests and the fees which he hoped to secure, that his obligation of undivided loyalty to the stockholders whom he represents was not fulfilled,"—is unfair, unwarranted and in no manner supported by the record. The balance of the quoted paragraph is likewise characterized and contested.

30. In findings (pp. 13, 14 and 15), the correctness of the chronology of settlement negotiations is contested, and it is contended that omissions and variations if actually set forth would compel a quite different presentation.

* * *

34. The finding (p. 2), "We also found that because of certain activities of William J. Cogan, who acted as attorney for the Van Kirk Committee, we could not approve the provisions of the plan,

which provided for the payment of an allowance for his services,"—is untrue. Use of the words "because of certain activities" shows the carelessness, if not the venom, which prompted them.

* * *

36. The findings (p. 2), "We issued an order to show cause why the amended plan should not be approved (Holding Company Act Release No. 9597). Upon the return of that order, the only questions raised related to our findings regarding allowances for services, and the effect of the quoted language upon the claim asserted on behalf of Market Street against Standard Power in the legal action mentioned above"—are misleading and untrue. The prefatory fourth paragraph of said order to show cause states: "Market Street, having on December 14th, 1949, filed its amended plan for liquidation and dissolution ('amended plan') in accordance with the aforesaid finding and opinion of the Commission,"—which is definitely untrue and omits the important changed provision to release Standard subsidiaries. On the return of an order to show cause, the mere recitation of an existence of an action in a United States District Court, and certainly the statement by William J. Cogan of the extent of the settlement arranged, automatically raises the question of the right to prosecute said action apart from the settlement, the question of validity of such cause of action and of its effect on the position taken by the Commission, that an overall settlement of $512,500 would be fair and reasonable.

37. The finding (p. 3) as to Cogan fees—"And have concluded that no adequate basis has been presented which would warrant any change in our determinations with respect to the allowance of fees" is improper and not warranted by the record.

* * *

39. The finding (p. 3), "In view of Cogan's activities, we found it necessary in our prior opinion to state that we were not accepting Cogan's negotiations as an indicium of fairness and pointed out that we had the duty to appraise the proposed payment independently,"—is untrue and unfair. A second use of the words "in view of Cogan's activities" becomes a foul blow, bearing in mind that what was criticized in the first instance was a single statement made at a chance meeting.

40. The finding (p. 3), "thus, in considering the plan we had before us what constituted, in effect, an offer of settlement made unilaterally by Market Street as the proponent of its own dissolution" is untrue and not supported by the record.

41. The finding (pp. 3-4), "We were required, under the circumstances of the case, to treat that offer in the framework of the whole record then before us just as if there had been no agreement between stockholders of Market Street and Standard Gas,"—is untrue, and the treatment accorded is not supported by the record.

* * *

45. The finding (p. 5), "Until the most recent

hearing, Cogan never disclosed that he had intended to arrange a settlement with Standard Gas, whereby he would attempt to preserve claims against Standard Power," is misleading and untrue.

The so-called "hearing" was an argument on an order to show cause. The claim against Standard Power was and is on a separate, distinct and equitable cause of action, which needed no preservation. The settlement with Standard Gas was announced on the S.E.C. record in plain terms, and was also set forth in a written pleading signed by Standard Gas and Market Street submitted to S.E.C., and was also set forth in a written pleading submitted to the United States District Court for the Northern District of California, Southern Division, and each and all of them stated settlement of the action on open account, and none of them provided for a release.

There was no duty to inform the S.E.C. of the proposed action against Standard Power, and the only one entitled to such knowledge was Cyril Appel, General Counsel of Market Street Railway Company, who was informed of such proposed action on or about December 2nd, 1948, which was a day or two after oral argument was had before the Securities and Exchange Commission on the settlement with Standard Gas.

* * *

As general objections to all of the findings, opinion and order, it is contended:

54. The Securities and Exchange Commission

had no reasonable basis for denial of attorney's fee to William J. Cogan.

* * *

57. The Securities and Exchange Commission made erroneous and misleading findings of fact and omitted to make essential findings of fact to permit proper consideration of the record and proper conclusions by the Court.

/s/ M. MITCHELL BOURQUIN,

/s/ WILLIAM J. COGAN,
Attorneys for
Charles T. Jones.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 15, 1950, U.S.D.C.

District Court of the United States, Northern District of California, Southern Division

Civil Action—File No. 29723

In the Matter of
MARKET STREET RAILWAY COMPANY

ORDER

A certain Plan to effectuate the provisions of Section 11(b) of the Public Utility Holding Company Act of 1935 (the "Act"), having been filed with the Securities and Exchange Commission (the "Commission") pursuant to Section 11(e) of the

Act by Market Street Railway Company ("Market Street"), a California corporation and a subsidiary company of Standard Gas and Electric Company ("Standard Gas") and Standard Power and Light Corporation ("Standard Power"), registered holding companies under the Act; said plan having been modified by amendments filed with the Commission by Market Street (which plan as so modified is hereinafter referred to as the "Plan"); the Commission, after notice and opportunity for hearing having found the Plan necessary to effectuate the provisions of Section 11(b) of the Act and fair and equitable to the persons affected thereby, and having approved the Plan by appropriate Order dated May 3, 1950, subject to certain conditions and reservations of jurisdiction; Market Street having requested the Commission to apply to a proper district court of the United States, in accordance with the provisions of Sections 11(e) and 18(f) of the Act, to enforce and carry out the terms and provisions of the Plan; the Commission having filed such an application with this Court on May 3, 1950; this Court, by order dated May 3, 1950, having fixed July 6, 1950, as the date for a hearing upon the Plan, and having prescribed the notice to be given of said hearing, the time within which objections might be made to the granting of the application of the Commission, to the approval by this Court of the Plan, or to the enforcement and carrying out of its terms and provisions, and the manner of making such objections; it appearing that due and sufficient notice of said hearing was given in accord-

ance with the provisions of said order of the Court; objections to said application of the Commission having been filed with this Court on behalf of William J. Cogan and Charles T. Jones, Lea Rosen and Hilda Fischman, and Clifford A. Smith, et al.; a hearing having been duly held in this Court on July 6 and 7, 1950; the Commission, Market Street, Standard Gas, and Standard Power having appeared at said hearing by their respective counsel in support of said application, and said objectors having appeared by their respective counsel in opposition thereto; all interested persons having been afforded an opportunity for hearing and having been given due notice thereof; and this Court having duly considered the Plan, the objections thereto, the briefs and memoranda submitted in support of and in opposition to the Plan, and having announced its opinion herein, and being fully advised in the premises:

It Is Hereby Found, Ordered, Adjudged, and Decreed:

(1) The Court finds and concludes that the findings of fact and conclusions of law embodied in the Findings and Opinion of the Commission dated September 30, 1949, its Supplemental Findings and Opinion dated March 9, 1950, and its Order dated May 3, 1950, copies of which are attached to the Commission's application herein dated May 3, 1950, as Exhibits G, J, and M, respectively, are supported by substantial evidence and were arrived at in accordance with legal standards, except that the Court

finds that the Commission's disapproval of any allowance of fees for William J. Cogan is not supported by substantial evidence, and, with respect to the amount of fees allowed for the services of Milton Paulson and his associates, the Court reserves decision pending reconsideration by the Commission as hereinafter provided.

(2) Subject to the terms and conditions of said Order of the Commission dated May 3, 1950, the Plan (Exhibit H to said application of the Commission, as modified by Exhibit L to said application of the Commission) is found to be fair and equitable and appropriate to effectuate the provisions of Section 11 of the Act, except insofar as the Plan fails to provide for compensation to William J. Cogan for his services and except with respect to Paragraph (d) on Page 2 of said Exhibit H.

(3) The objections to this Court's approval and enforcement of the Plan except as hereinabove provided are hereby overruled.

(4) The matter is hereby remanded to the Commission for the purpose of fixing an allowance to William J. Cogan; for reconsideration of the allowance to Milton Paulson; and for consideration of modifications to the Plan not inconsistent with the opinion of the Court herein.

(5) Until further order of this Court, Market Street Railway Company, Standard Gas and Electric Company, and Standard Power and Light

Corporation, all security holders of said corporations, and all other persons are hereby enjoined and restrained from doing any act or taking any action interfering or tending to interfere with these proceedings or with proceedings before the Commission pursuant to this Order, including the commencement or prosecution of any action, suit, or proceeding, at law or in equity or under any statute, in any court or before any executive or administrative officer, commission, or tribunal, other than such proceedings before the Commission or this Court as may be appropriate under the Act and the rules and regulations promulgated thereunder, and such review, if any, in an appropriate appellate court of the United States as may be provided by law.

(6) This Court reserves jurisdiction to entertain such further proceedings, to make such further findings, to enter such further orders, to give such further relief, and to take such further action as may be necessary or appropriate in connection with the Plan and this Order.

Dated: This 11th day of July, 1950.

/s/ LOUIS E. GOODMAN,
United States District Judge.

Approved as to form:

/s/ MYRON S. ISAACS,
Counsel for the Securities and Exchange Commission.

/s/ DOUGLASS NEWMAN,
Counsel for Market Street Railway Company.

/s/ HELMER HANSEN,
Counsel for Standard Gas and Electric Company.

/s/ [Illegible], for
SEIBERT & RIGGS,
Counsel for Standard Power and Light Corporation.

/s/ WILLIAM J. COGAN,
Pro Se, and Counsel for Charles T. Jones.

/s/ FRANCIS J. McTERNAN,
Counsel for Lea Rosen and Hilda Fischman.

/s/ M. MITCHELL BOURQUIN, and
JOHN E. LYNCH,
Counsel for
Clifford A. Smith, et al.

[Endorsed]: Filed July 11, 1950, U.S.D.C.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the Securities and Exchange Commission, applicant herein, hereby appeals to the United States Court of Appeals for the Ninth Circuit from those portions of the order, entered on July 11, 1950, finding that the Commission's disapproval of any allowance of fees for William J. Cogan is not supported by substantial evidence and that the Plan of Market Street Railway Company, insofar as it fails to provide for compensation to William J. Cogan for his services, is not fair and equitable and appropriate to effectuate the provisions of Section 11 of the Public Utility Holding Company Act of 1935 and remanding the proceeding to the Commission for the purpose of fixing an allowance to William J. Cogan.

/s/ ARTHUR E. PENNEKAMP,
Attorney for Appellant,
Securities and Exchange
Commission.

[Endorsed]: Filed August 7, 1950, U.S.D.C.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that William J. Cogan, respondent herein, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the whole of the order entered herein on July 11, 1950, save and except those portions thereof which find that the Securities and Exchange Commission's disapproval of any allowance of fees for said William J. Cogan is not supported by substantial evidence and those portions thereof which order a remand in the matter to said Commission for the purpose of fixing an allowance of fees to said William J. Cogan.

Dated: August 29, 1950.

/s/ WILLIAM J. COGAN, Pro Se,

/s/ E. MITCHELL BOURQUIN,
Attorneys for Respondent,
William J. Cogan,

[Endorsed]: Filed September 7, 1950, U.S.D.C.

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF RECORD ON APPEAL

The Securities and Exchange Commission, appellant herein, hereby designates the following portions of the record, proceedings, and evidence to be contained in the record on appeal herein:

1. Application of the Securities and Exchange Commission dated May 3, 1950, including all exhibits annexed thereto.

2. Order of the District Court dated May 3, 1950, setting application for hearing, etc., including exhibit annexed thereto.

3. Objections of Charles T. Jones, together with Notice of Appearance dated June 15, 1950, and authorization and affidavit of Jones annexed thereto.

4. Notice of appearance on behalf of William J. Cogan, dated June 15, 1950.

5. Volume 4 of the Reporter's Transcript of Proceedings in the District Court, covering part of the hearing held on July 7, 1950.

6. Exhibit 1 in the District Court proceeding, received in evidence July 6, 1950 (Volume 1, page 6, of Reporter's Transcript), in part as follows:

Securities and Exchange Commission Docket Vol. 54-169-1-2, constituting the official transcript of proceedings before the Securities and Exchange Com-

mission on July 13, July 14, July 21, and November 30, 1948, and January 16, 1950.

7. Order of the District Court dated July 11, 1950.

8. Appellant's Notice of Appeal filed herein on August 7, 1950, appealing from portions of the order of the District Court dated July 11, 1950.

9. Appellant's Statement of Points.

10. This Designation of Record on Appeal.

Appellant further reserves the right to designate other portions of the record, proceedings, and evidence to be contained in the record on appeal if such procedure be deemed necessary by reason of the filing of any counter designation or any objection to this designation.

Dated:

/s/ ROGER S. FOSTER,
General Counsel.

/s/ MYRON S. ISAACS,
Special Counsel,
Division of Public Utilities.

/s/ ARTHUR E. PENNEKAMP,
Attorneys for the Appellant, Securities and Exchange Commission.

[Endorsed]: Filed September 11, 1950, U.S.D.C.

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS

The Securities and Exchange Commission, appellant herein, submits the following as the points upon which it intends to rely in the prosecution of its appeal:

1. The District Court erred in finding that the Commission's disapproval of any allowance of fees for William J. Cogan is not supported by substantial evidence.

2. The District Court erred in not finding that the Amended Plan for Liquidation and Dissolution of Market Street Railway Company, as modified by Amendment No. 1 thereto, insofar as it fails to provide for compensation to William J. Cogan for his services, is fair and equitable and appropriate to effectuate the provisions of Section 11 of the Public Utility Holding Company Act of 1935.

3. The District Court erred in remanding the proceeding to the Commission for the purpose of fixing an allowance to William J. Cogan.

Dated:

/s/ ROGER S. FOSTER,
General Counsel.

/s/ MYRON S. ISAACS,
Special Counsel,
Division of Public Utilities.

/s/ ARTHUR E. PENNEKAMP,
Attorney for the Appellant,
Securities and Exchange
Commission.

[Endorsed]: Filed September 11, 1950, U.S.D.C.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Charles T. Jones, respondent herein, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the whole of the order entered herein on July 11, 1950, save and except those portions thereof which find that the Securities and Exchange Commission's disapproval of any allowance of fees for said William J. Cogan is not supported by substantial evidence and those portions thereof which order a remand in the matter to said Commission for the purpose of fixing an allowance of fees to said William J. Cogan.

Dated: September 13, 1950.

/s/ WM. J. COGAN,

/s/ M. MITCHELL BOURQUIN,
Attorneys of Respondent,
Charles T. Jones.

[Endorsed]: Filed September 15, 1950, U.S.D.C.

COMMISSION'S EXHIBIT No. 4

United States of America
Before the Securities and Exchange Commission

In the Matter of
STANDARD GAS AND ELECTRIC COMPANY
and Its Subsidiaries,

PUBLIC UTILITY ENGINEERING & SERVICE CORPORATION (formerly Byllesby Engineering and Service Corporation),

and

MARKET STREET RAILWAY COMPANY

PETITION

The petition of Russell M. Van Kirk, Bloomfield Hulick and Edmund T. Willetts, by their duly authorized attorney, William J. Cogan, upon information and belief, claims and alleges as follows:

1. Your petitioners are, and for upwards of five years have been, holders and owners of shares of prior preference capital stock of Market Street Railway Company.

2. On or about March 4th, 1947, your petitioners duly constituted themselves as and for a stockholders' protective committee, as representatives of the holders and owners of seven thousand (7000) shares of said prior preference capital stock of Market Street Railway Company and for and on behalf of all others similarly situated.

3. That Market Street Railway Company is a corporation duly organized and existing under the laws of the State of California, and up to, on or about September 29th, 1943, owned and operated a street railway system in the City and County of San Francisco, California, when it sold said street railway to said City and County of San Francisco for the sum of Seven Million Five Hundred Thousand Dollars ($7,500,000) payable partly in cash and partly over a period of years from receipts from operations.

4. That Market Street Railway Company is capitalized as follows:

Prior Preference 6% Cumulative:

Authorized, 117,500 shares of $100.00 par value each;
Outstanding, 116,185 shares $11,618,500

Preferred 6% Cumulative:

Authorized, 50,000 shares of $100.00 par value each;
Outstanding, 49,868½ shares ....$ 4,986,850

Second Preferred 6%:

Authorized, 47,000 shares of $100.00 par value each;
Outstanding, 46,737 shares ....$ 4,673,700

Common:

Authorized, 107,000 shares of $100.00 par value each;
Outstanding, 106,474 shares $10,647,400
Total Capital Stock..$31,926,450

Re: Prior Preference Stock

Note: At December 31, 1946, cumulative dividends were in arrears from April 1, 1920, to December 31, 1921, and from January 1, 1924, to date amounting to $148.50 per share, aggregating $17,-261,362.50, thus representing a total prior preference

to its stockholders over other classes of stock in the distribution of assets amounting to $28,879,862.50.

5. In 1919, Byllesby Engineering and Service corporation was formed, and its entire capital stock was issued to Standard Gas & Electric Company, which caused its own executives and principal employees to act as executives and principal employees of Byllesby Engineering and Service Corporation up to, on or about September 20th, 1935, when Standard Gas & Electric Company sold said stock to former employees of Standard and Byllesby, who thereafter caused the name of Byllesby Engineering and Service Corporation to be changed to Public Utility Engineering and Service Corporation.

6. From and after 1919, Standard Gas & Electric Co., through the medium of Byllesby Management and Service Corporation, proceeded to take from any company owned or controlled by Standard Gas & Electric Co., pursuant to contracts it caused such owned or controlled companies to make and enter into with said Byllesby Engineering and Service Corporation, a management fee, usually measured by one and one-half per cent (1½%) of its gross revenues and for which it gave no actual and valuable service.

7. That in 1921, Market Street Railway Company caused its prior preference stock to be listed on the New York Stock Exchange, and ever since said date, the said prior preference capital stock of Market Street Railway Company has been widely distributed among the public.

8. That in 1926, Standard Gas and Electric Company acquired 39.67% of the voting securities of Market Street Railway, represented by 78% of the first preferred stock, 54. plus % of the second preferred stock and 58% of the common stock.

9. That ever since 1926, by reason of the wide distribution of the prior preference stock listed on the New York Stock Exchange and its large percentage of other voting stock, the Standard Gas and Electric Company has actually controlled Market Street Railway Company and elected its board of directors, and in turn its officers.

10. That in 1927, Standard Gas and Electric Company caused Market Street Railway Company to make and enter into a contract with Byllesby Management and Service Corporation for alleged management services and caused it to pay Byllesby Management and Service Corporation in 1927 for the use and benefit of Standard Gas and Electric Company the sum of $95,833.34, which was charged to surplus, and for which it received no value.

11. That during successive years said management fees paid or payable by Market Street Railway Company to Byllesby Engineering and Management Corporation for the use and benefit of Standard Gas and Electric Company were steadily increased to a high of $175,000 per year in 1932 and amounted to upwards of $687,500 up to, on or about June 30, 1932, for which Market Street Railway Company received no value.

12. That after said sum of upwards of $600,000 was paid by Market Street Railway Company, it appears that a further sum of $87,500 was paid by Market Street Railway Company to Byllesby Engineering and Management Corporation for alleged management fees from January 1, 1932, to June 30, 1932, for a total approximate sum of such fees paid, amounting to $700,000.

13. From 1931 to 1933, Standard Gas and Electric Company allegedly loaned and advanced to Market Street Railway Company in cash $784,000, and transferred to itself an indebtedness of Market Street Railway Company to Byllesby Engineering and Management Corporation for alleged management fees of $232,110.33 covering the period of July 1, 1932, to December 31, 1933.

14. That actual management fees paid by Market Street Railway Company approximately equal the amount of the cash advances made to it by Standard Gas and Electric Company on open account.

15. Any and all of the aforesaid management fees paid by Market Street Railway Company to Byllesby Engineering and Service Corporation and in turn to Standard Gas and Electric Company were so paid solely and entirely by reason of the fact that Standard Gas and Electric Company controlled Market Street Railway Company and were of no value to Market Street Railway Company, and such payment constituted a fraud upon the Market Street Railway Company by Standard Gas

and Electric Company, and any such management fees incurred by Market Street Railway and constituting a part of the alleged open account due Standard Gas and Electric Company likewise represented a fraud upon Market Street Railway Company perpetrated by Standard Gas and Electric Company.

16. Investigations made in the past by the Federal Trade Commission and by the Securities and Exchange Commission have shown beyond doubt that public utility service companies were set up by various systems for the sole purpose of extracting money and payments from operating companies which could not have been taken off in any other manner; and as a result thereof, stockholders of operating companies have been placed in a position where they could assert their rights based upon the facts developed by such investigation. However, no such investigation has heretofore been made concerning the manner and extent of such extraction of management fees from Market Street Railway Company by Standard Gas and Electric Company.

17. An analysis of open account receivable from Market Street Railway Company prepared by Standard Gas and Electric Company's representatives indicates that Standard Gas and Electric Company claims there was due from Market Street Railway Company as a balance of said open account on September 30, 1943, $1,136,069.83, and your Petitioners claim and allege that if given proper credit for the fraudulent management fees charged against

Market Street Railway Company the amount thereof would serve to offset the entire open account from Standard Gas and Electric Company.

18. The present management of Market Street Railway Company is headed by Samuel Kahn, President, who has been a director of the company since November 6, 1925, and the said Samuel Kahn has expressed, in writing, his intention to pay in full the open account claimed by Standard Gas and Electric Company, with the exception of a variance in interest rates for part of the period of time covered by said open account.

19. The proxy statements sent out during the last few years by the management of Market Street Railway Company contain the statement that in the past the ownership of securities by Standard Gas and Electric Company have been sufficient to permit it to elect a majority of the board of directors of Market Street Railway Company, and they have in fact done so.

20. In 1943, after arrangements had been made by the management of Market Street Railway Company to sell its street car operating properties to the City and County of San Francisco for the sum of $7,500,000, and in an attempt to perpetuate such management in office until the complete liquidation of the assets of the company was had, and also for the purpose of minimizing any possibility on the part of prior preference stockholders to question the payment of management fees and the correct-

ness and validity of the open account of Standard Gas and Electric Company, the board of directors of Market Street Railway Company appointed Samuel Kahn (its president) as general manager for a period of seven years from August 1, 1943, at an annual compensation of $37,500. It also employed Cyril Appel, one of its directors, as attorney at $20,000 per year until the liquidation of the company and its property provided the operative properties of the company are acquired by the City and County of San Francisco, but not to exceed a period of six and one-half years from September 1, 1943.

21. On January 20, 1947, an action was filed in the District Court of the United States for the Northern District of California, Southern Division, entitled "Standard Gas and Electric Company, Plaintiff, vs. Market Street Railway Company, Defendant, Civil Action File No. 26807-R." This action is brought upon the open account to recover the sum of $1,069,063.30, together with interest and costs. The principal sum sued for includes interest accrued by Standard Gas and Electric Company at the rate of 6% per annum to December 31, 1946. This indebtedness with interest accrued at 4% from October 24, 1939, to December 31, 1946, amounts to the sum of $948,439.01, as shown on the Company's balance sheet as "Indebtedness to Affiliate." The management is only litigating the difference in the interest figure and proposes to admit the validity and correctness of the open account otherwise.

22. The petitioners propose to institute an action

against Standard Gas and Electric Company and others in the United States Courts, or to intervene in the action above referred to, but they are aware that on occasions in the past, the Commission has restrained such litigation and has compelled hearings before the Commission in such matters.

23. The management of Market Street Railway Company has on March 15, 1947, sent a notice to the stockholders thereof of annual meeting to be held on April 23, 1947, and has enclosed therewith a proxy statement and a proxy which, among other things, discloses that the entire management owns a total of eight (8) shares of common stock of Market Street Railway Company.

24. As above indicated, Standard Gas and Electric Company owns no prior preference stock of Market Street Railway. It, therefore, has no equity stock of any kind or nature, but through the use of the voting rights available to the junior securities, it has managed and controlled Market Street Railway Company at all times since 1926, and still does so. It has given all of its capital stock of Market Street Railway Company a ledger value on its books of Three Dollars ($3.00).

By reason of the foregoing facts, and allegations, your Petitioners ask the Commission to take jurisdiction and to direct that an investigation be made by its staff and proceedings be had before the Commission to the end that the legal and equitable rights of the respective parties may be adjudicated.

Your Petitioners ask the Commission to forth-

with direct the management of Market Street Railway Company to provide your petitioners with a complete list of the names and addresses of all stockholders of Market Street Railway Company and to postpone the said annual meeting to such later date as will provide your petitioners with sufficient time to secure said list and to prepare and issue a proxy statement and letter to all such stockholders.

Your petitioners further ask the Commission to enjoin and restrain Standard Gas and Electric Company from voting any of its shares of stock of Market Street Railway Company at the next annual meeting thereof on the ground that Standard Gas and Electric Company not only has no equity in the assets of such company but actually has an adverse interest.

Your petitioners further ask the Commission to enjoin and restrain the Standard Gas and Electric Company and/or Market Street Railway Company from in any manner proceeding with an action filed in the District Court of the United States for the Northern District of California, Southern Division, on January 20, 1947, wherein Standard Gas and Electric Company is Plaintiff, and Market Street Railway Company is defendant, which said action was designated as having Civil Action File No. 26807-R.

Dated March 21, 1947.

/s/ WILLIAM J. COGAN,
Attorney for Petitioners.

Filed March 21, 1947.

COMMISSION'S EXHIBIT No. 5

United States of America
Before the Securities and Exchange Commission

In the Matter of
STANDARD GAS and ELECTRIC COMPANY
and Its Subsidiaries

PUBLIC UTILITY ENGINEERING AND SERVICE CORPORATION (Formerly Byllesby Engineering and Service Corporation)

and

MARKET STREET RAILWAY COMPANY

MEMORANDUM IN SUPPORT OF PETITION AND APPLICATION FOR LEAVE TO BE HEARD UPON RESUBMISSION OF PETITION ON BEHALF OF PRIOR PREFERENCE STOCKHOLDERS' COMMITTEE OF MARKET STREET RAILWAY COMPANY

A petition was filed in the above-entitled matter by the undersigned, William J. Cogan, with the Commission on March 21, 1947, on behalf of a committee of prior preference stockholders of Market Street Railway Company (of San Francisco).

The petition sought broad relief, including (1) issuance of an order after notice and opportunity for hearing, pursuant to Sec. 11 (b) (2) of the Public Utility Holding Company Act, declaring it to be in the best interest of the security holders of Market Street Railway Company to preclude and enjoin Standard Gas and Electric Company from

voting its shares of stock of Market Street Railway Company at the annual meeting of stockholders scheduled for Wednesday, April 23, 1947, at 2:30 p.m., or adjourned date thereof, by reason of the fact that the said shares of stock do not represent any actual equity in the assets of the Market Street Railway Company, that they have heretofore, and presently represent the control of said company and that said Standard Gas and Electric Company has an interest adverse to that of the other stockholders, as represented by an action at law presently under way wherein Standard Gas and Electric Company is plaintiff and Market Street Railway is defendant, not properly opposed by the present management;

(2) issuance of an order within the scope of Section 15 (g) of the Act as necessary and appropriate in the public interest, and for the protection of investors, directing Standard Gas and Electric Company and Market Street Railway to provide the prior preference stockholders committee with a complete list of all stockholders of Market Street Railway Company, to permit the petitioners to solicit participation by said stockholders in any action or proceeding or activity which petitioners may institute or join or engage in and so that petitioners might inform all said stockholders at its own or at company expense as directed, what they consider to be the true facts and actual status of alleged indebtedness by Market Street Railway Company to Standard Gas and Electric Company;

(3) issuance of an order, likewise within the

scope of Section 15 (g) of the Public Utility Holding Company Act, and Section 14 (a) of the Securities Exchange Act of 1934, upon motion of the Commission and as part of general relief to petitioners directing Market Street Railway Company to provide petitioners with a complete list of all stockholders with names and addresses; to adjourn the date of the annual meeting of stockholders thereof now scheduled for April 23, 1947, to permit petitioners to prepare and submit proxy material to be sent at the expense of the Company for the election of an independent board of directors of Market Street Railway Company ready, able and willing to litigate with Standard Gas and Electric Company in any forum;

(4) that the Commission, pursuant to the provisions of Section 18 of the Public Utility Holding Company Act upon its own motion but at the request of petitioners investigate the facts, conditions, practices and matters encompassed by the allegations of the petition and more particularly that the Commission, pursuant to Section 18 (b) of the Act, investigate and learn the true facts of the financial relationship between Standard Gas and Electric Company and Market Street Railway Company, having its inception in 1926, when Standard Gas and Electric Company bought control and forthwith caused a wholly owned subsidiary to abstract as purported management fee approximately $100,000, and thereafter divers sums aggregating $700,000 without value received or services rendered

and which caused an alleged open account to be started and continued, whereby over a period of years down to the present the Market Street Railway Company is alleged as owing upwards of $1,-000,000 to Standard Gas and Electric Company; and whether or not said Standard Gas and Electric Company from time to time filed its reports pursuant to law with S.E.C. in such manner as to be false and misleading; and whether or not Public Utility Engineering and Service Corporation (formerly Byllesby Engineering and Management Corporation), a wholly owned subsidiary of Standard Gas and Electric Company in making application to the Commission pursuant to and in apparent compliance with Section 13 of the Holding Company Act imposed upon the Commission and failed and neglected in good faith to tell the full truth of the manner in which it previously parted affiliate companies from their assets; and finally whether Standard Gas and Electric Company, through its control, and Market Street Railway Company Management, through its subservience, have adversely affected a true and open market in the prior preference shares of stock of Market Street Railway Company on the New York Stock Exchange and/or on the San Francisco Stock Exchange, and whether the present manner of liquidation by such controlled Management affects the public interest adversely.

The petition had not been submitted to the Commission by the Staff on March 31st, and request was made by telegram addressed to the Chairman,

to be heard, when the matter was presented by the Staff.

On Wednesday, April 2, 1947, at 3:45 p.m., Mr. John Morris, of the Public Utility Staff, telephoned to the office of William J. Cogan, but only reached him by return call on April 3, 1947.

Mr. Morris stated the petition was read to the Commission on April 2nd in the morning with his recommendation that the Commission should not take jurisdiction but should leave the petitioners to their remedy to intervene in the action by Standard Gas and Electric Company against Market Street Railway Company mentioned in the petition and that Market Street Railway Company being in liquidation, there would be little gained by the Commission's action at this late date.

The only purpose intended to be served by reference to the conversation with Mr. John Morris is to indicate now to the Commission my personal feeling that I have not had my day in your Court, and that the issues are of such vital importance to investors as to warrant more considered attention.

In support of my contention that this case warrants and requires your thoughtful consideration and action, I recite the following facts which my research drew from Commission records:

Mr. Ganson Purcell, former chairman, addressed the American Institute of Electrical Engineers on December 13, 1944, and said in part:

> "The non-independent character of system service companies was a matter of deep concern to the Congress. Congress learned in the course

of its study of public-utility holding company systems that the system service company had become largely a control medium and a device to extract from the operating companies compensation and payments which could not have been taken off in any other manner. These practices were detrimental to consumers and investors of the operating companies. Therefore, Congress concluded that services to operating companies by system service companies should be rendered at cost. The standards governing the kind and character of services which may be rendered, the nature and scope of the relationship, and the methods of making reports concerning such services and relationships, are expressed in Section 13 of the Holding Company Act.

"The Commission has required substantial modification of the service contracts which were in effect at the time the statute was adopted. In a number of cases the Commission has stated the principle that the compensation and collateral expenses of holding company officers and employees must be borne directly by the holding companies and not be shared by their controlled service companies and thus passed on to the operating companies. The Commission has also ruled that each service company should confine itself to functions and services which the operating subsidiaries cannot perform as efficiently and economically for themselves.

> "At the time the Commission considered and disposed of the plan of Standard Gas and Electric Company for divestment of five of its subsidiary companies, jurisdiction, upon the request of Standard Gas and Electric, was reserved by the Commission to consider the service company problem at some later date. We were advised by Standard Gas and Electric that it was then in process of working out a plan of disposition of its service company, Public Utility Engineering and Service Corporation, to that company's employees. We have been recently informed that negotiations to that end are presently under way, and that the definitive proposal will be submitted to us."

Your opinion in Release No. 5430 of November 18, 1944, includes the following at page 64:

> "Standard Gas owns all of the securities of Public Utility Engineering and Service Corporation, a service company which has been approved under Section 13 of the Act. The service company performs extensive services for all of the companies in the Standard Gas system and we should ordinarily be disposed to examine into and determine the relations which the service company should have with the companies in the Standard Gas system control of which is otherwise being disposed of under the plan. Standard Gas states, however, that it plans to sell the service company to the individuals who now are employed by the service

company. Accordingly, we will not now impose any conditions concerning the future relations between the service company and OG&E, Copco, Mountain States and the Wisconsin Company, as that question can be treated in a more definitive manner in the proceedings on the application for the sale of the service company. We will therefore reserve jurisdiction in our order as to this question."

File No. 37-32. In the Matter of Public Utility Engineering and Service Company (formerly Byllesby Engineering and Management Corporation) contains testimony given by William Hagenah, its president and former vice president and director when it was Byllesby. He freely admitted that Byllesby had a net income for 1919-1929 of over seventeen million dollars and that in 1927 alone it had a gross of more than $5,000,000. He testified further that Standard Gas and Electric Company took all this money and paid it out as dividends on the common stock. He did not claim that any value was ever given or attempted.

Letter of September 20, 1935, to Standard Gas and Electric Company signed by M. A. Morrison, vice president of Byllesby and approved by B. W. Lynch, vice president of Standard, agrees that from the time of organization all of the Byllesby stock had been owned by Standard, that many Byllesby executive officers and some employees were Standard executives and employees, salaries for whom had been charged to Byllesby Engineering and Management Corporation. The letter refers

to a present sale of the stock of Byllesby by Standard and makes an offer to provide administrative and clerical services and office space for $12,500 per month subject to thirty days' termination notice.

File No. 70-82, includes an application by Standard Gas and Electric to sell its open account (valued by Hart, Engineer, at $1,000,000), and its capital stock of Market Street Railway Company to Allyn & Company for $800,000. This record includes a statement by Victor Emanuel made as part of a resolution of the Board that the validity of the open account might be questioned. The record also includes a statement by a vice president of Standard that it operated management contracts sometimes by remote control and also includes analysis of the open account from August 31, 1931, to September 30, 1943, offered and received in evidence as Comm. Exh. 3 on November 22, 1943, but the Trial Examiner would not permit extended examination, or in fact, any on the validity of the account as not within the issues before him.

Standard Gas and Electric Company reported to the Commission as of December 31, 1944, a contract authorized by the Board of Directors of Market Street Railway Company at a meeting on July 22, 1943, between that company and Samuel Kahn (its president) wherein he was appointed General Manager for a period of seven years from August 1, 1943, at an anual compensation of $37,500; also a contract between the Company and Cyril Appel (vice president) as General Counsel until the liquidation of the Company and its properties

(est) $6\frac{1}{2}$ years, at $20,000 per year.

A Market Street Railway Company summary of surplus charges from April, 1921, to December 31, 1937, has an item, 23, marked "Byllesby's Management fees for year ended December 31, 1927, $95,-833.34." This is less than one year after Standard got control and is apparently the first year's charge.

It may be considered a singular circumstance that no other record in S.E.C. shows what money was paid by Market Street Railway Company to Byllesby during 1928, 1929, 1930 and 1931, and part of 1932.

It would appear that Standard Gas and Electric Company and Market Street Railway were threatened with a survey to be made by the Public Utility Commission of California in December, 1935, which proposed to consider operating economies through elimination of executive salaries, payments to holding companies for management services and elimination of duplication of service then existing under competitive conditions (Wall Street Journal 12/12/35). It is fair to assume they also considered such charges as worthless.

It is submitted that the material referred to, if supplmented by a hearing to develop the testimony of those persons alleged to have rendered service and those who decided the fees, and those who were accountants and bookkeepers for Byllesby and for Standard on 1926-1934 would properly and expeditiously dispose of the issues on such management fees and the more or less concurrent open account

charges made by Standard against Market Street Railway.

It is further submitted that the history of management and service companies generally, and the admissions of the President of this one raise a definite presumption that the charges were arbitrarily and fraudulently assessed by Standard against Market Street Railway through Byllesby and should be sustained by Standard and not Market Street Railway.

A further reason and a substantial one why the Commission should assume and keep jurisdiction in this controversy lies in the fact that of the four classes of stock issued by Market Street Railway Company only the prior preference shares were listed on National securities exchanges. The prior preference shares were listed on the San Francisco Exchange. On January 25, 1938, Samuel Kahn notified stockholders that on September 24, 1937, he had requested S.E.C. to delist the prior preference shares, for reasons stated in such notice, which may or may not have been the true and correct ones.

The prior preference shares have been listed on the New York Stock Exchange since June, 1921, and are still listed on the New York Stock Exchange.

The market variation over the years has been considerable and apparently not warranted by the consistently poor operations reports or by prospects.

The high and low prices from 1929 to 1945 were:

Year	High	Low
1929	39½	14½
1930	25½	13
1931	22	5½
1932	9	2⅛
1933	8	1⅞
1934	12½	3
1935	23¾	3¾
1936	45	18¾
1937	39	6¾
1938	16	5⅜
1939	8⅛	3
1940	13¾	7⅞
1941	11¼	3⅜
1942	11½	4¾
1943	18¼	9
1944	21	12½
1945	18⅞	15⅛

The mere fact that the prior preference shares have been listed and advertised since 1921 on the New York Stock Exchange as such prior preference shares must have made them peculiarly susceptible to favorable rumor over the intervening years and constituted in a measure a representation to the public that they were entitled to a prior preference.

It now appears that during the past twenty years the "prior preference" was actually had by Standard Gas and Electric Company and its continued election of a favorable board has prevented public knowledge of its overreaching and has prevented the preference owed by the Management from being exercised.

The Forum

Mr. John Morris has suggested and recommended to the Commission that the Committee and any other prior preference stock be denied relief except the qualified relief due any application for a stockholders' list and that the relative rights be tried at law in the action now before the United States District Court, Northern District of California, South-

ern Division, wherein Standard Gas and Electric Company is plaintiff and Market Street Railway Company is defendant, wherein Standard sues for $1,069,063.30 as the amount due with interest to December 31, 1946, and which is not disputed by the Management of Market Street Railway Company except as to an item of 2% interest from October 24, 1939, to December 31, 1946.

This is the forum chosen by Standard Gas and Electric Company in preference to the Commission, following an exchange of letters between a member of the Committee who wrote Mr. Leo Crowley, President of Standard on December 18, 1946, wherein he indicated an intention to have the matter presented to the Commission unless a proposed conference would clear up the matter, and an answering letter from Mr. Crowley dated December 27, 1946, in which he wrote that he would be in New York the latter part of January and indicated a willingness to have such a conference.

Examination of the petition will show that the Committee has in no way acquiesced in such selection of the forum and the following represent cogent reasons in summary form why the proper forum is the Commission:

1. The Commission is in possession of a variety of records which form a substantial basis for quickly developing the true facts.

2. It would appear that various of the provisions of law administered by the Commission have or may have been violated continuously by Standard

Gas and Electric Company, and that these should be the subject of investigation by the Commission rather than permit Standard to choose a forum where such violations would not be proper subjects of litigation.

3. The Commission has expressed a wish and intention to protect the rights of small stockholders through the exercise of its powers and in pursuance of its duty.

4. It would be in the public interest and for the protection of investors in a security listed on a national exchange for the Commission to develop the true facts.

5. The continued fraud is more reprehensible from a Commission viewpoint in that the continued history of the prior preference shares was a continuing invitation to the public to invest or speculate in said shares.

6. Standard Gas and Electric Company, by electing its own management of Market Street Railway Company, has made it impossible to use Market Street Railway funds to litigate the question of fraud presented by the petition.

7. The subpoena power of the Commission would minimize the expenditure of time and money and facilitate the proper disposition of the issues.

8. The fraud was a continuing one during the full regime of the Commission in that 72% interest on the open account has accrued from 1934 to 1946.

9. By taking jurisdiction, the Commission would

be assured of the correctness of its position in the event it saw fit to enjoin Standard from voting its stock at the annual meeting of stockholders and in the event it required a complete stockholders' list and in the event it ordered an adjournment of the annual meeting and otherwise gave heed to applications by the Committee.

In the event it appears to the Staff of the Public Utility Division that the result of litigating this matter would not materially effect any 11 (e) plan presented by Standard Gas and Electric and that constitutes the principal reason for recommending no action to the Commission, the Committee suggests and requests that members of the Staff of the Trading and Exchange or other Division conduct for the Commission the necessary proceeding to develop the facts whereby the Commission may be informed or learn what violations exist as to reports, as to stock market activity and as to other matters involved in the studied attempts by Standard Gas and Electric Company over the years to hide the true facts from the Commission and the public.

It would moreover be far preferable, if such fraud can be proven, that it be done in the forum which has been deciding the ultimate status of the Standard Gas system and eliminating the bad spots therefrom.

It is requested that this be considered an application to supplement the petition filed herein and that the Commission authorize William J. Cogan as attorney for the Committee herein to appear before the Commission in support of the petition and that

it direct the Staff to resubmit said petition to the end that the Commission may give consideration to the overall picture as now presented and preliminary to any action by the Commission on the petition and this memorandum.

It is further requested that after such consideration the Commission cause to be stated in writing what course of action it is willing to, and intends to, take, based on such petition and memorandum so that the Committee may be guided and advised in connection with their proper procedure and action.

/s/ WILLIAM J. COGAN.

Dated New York, N. Y., April 8, 1947.

Filed April 10, 1947, U. S. Securities and Exchange Commission.

COMMISSION'S EXHIBIT No. 77

Standard Gas and Electric Company
Statement of Income Received From Market Street
Railway Company From 1924 to June 30, 1947

Year	Description of Income	Amount
1924		None
1925		None
1926		None
1927		None
1928		None
1929		None
1930		None
1931	Interest on open account receivable	$ 4,438.52
1932	Interest on open account receivable	25,441.54
1933	Interest on open account receivable	39,282.76
1934	Interest on open account receivable	46,610.29
1935	Interest on open account receivable	49,580.29
1936	Interest on open account receivable	51,927.85
1937	Interest on open account receivable	51,785.96
1938	Interest on open account receivable	51,785.96*
1939	Interest on open account receivable	4,398.26
1940		None
1941		None
1942		None
1943		None
1944		None
1945	Interest on open account receivable (applicable to period from 1/24/39 to 10/24/39)	38,733.06
1946		None
1947	(to June 30)	None

[$363,984.49 shown in pencil in margin.]

* Includes $30,362.18 accrued and taken up as income during the period from June to December, 1938, but not received until 1945.

COMMISSION'S EXHIBIT No. 82

Public Utility Engineering and Service Corporation

STATEMENT SETTING FORTH THE BASIS FOR COMPUTING THE PROFIT ON SERVICES RENDERED TO MARKET STREET RAILWAY CO.

Prior to June 1, 1939, no Cost Records were kept by the Service Corporation, therefore, no statement can be made setting forth the basis for computing profit for services rendered to that date. Subsequent to June 1, 1939, all services were rendered at cost.

Received August 22, 1947, U. S. Securities and Exchange Commission.

United States of America
Before the Securities and Exchange Commission

DECLARATION AS TO SOLICITATIONS PURSUANT TO RULE U-62

The declarants are:

Russell M. Van Kirk, 37 Wall Street, New York 5, New York.

Bloomfield Hulick, West Allenhurst, New Jersey.

Edmund T. Willetts, 108 Greenwich Street, New York 6, N. Y.

As a Committee of prior preference stockholders of Market Street Railway Company.

William J. Cogan, Esquire, 116 John Street, New York 7, N. Y., is counsel to the Committee and the person to whom communications from the Commission with respect to the declarations shall be addressed.

The holders and owners of the prior preference stock of Market Street Railway Company comprising some 700 odd individuals and firms are to be solicited by the Committee for the purpose of obtaining representation by the Committee for said stockholders in connection with asserting the legal and equitable rights of said stockholders as a class before the Securties and Exchange Commission and/or in any court wherein the Committee may see fit to enter an appearance. The primary claim made by the Committee is that Market Street Railway Company paid upwards of $1,000,000 for management fees to Byllesby Engineering and Management Corporation by reason of the fact that Standard Gas and Electric Company controlled both said corporations and it is claimed that said services were of little or no value to Market Street Railway Company and that as a result of such payments Market Street Railway Company became indebted to Standard Gas and Electric Company in a sum now claimed as $1,069,000. It is the purpose of the Committee to question the validity of such indebtedness, and to claim the return of all monies paid to Byllesby Engineering and Management Corporation, most of which was in turn paid to Standard Gas and Electric Company as dividends.

The Committee estimates that the cost of the

solicitation will be approximately $500 represented by the cost of printing one letter of solicitation with covering envelope and return envelope and the cost of printing a proposed authorization by said stockholders and the cost of printing the copy of the opinion and order of the Securities and Exchange Commission dated July 3, 1947, for enclosure with the letter of solicitation.

The copy of the letter of solicitation to be used by the Committee is submitted herewith and a copy of the proposed authorization to be signed by said stockholders is also submitted herewith.

It is proposed to make only one request to the stockholders of Market Street Railway Company by sending to them through the mails the proposed letter of solicitation with enclosures of a mimeographed copy of the opinion and order of the Commission in the same form and style as issued by the Commission and also enclose a proposed authorization and a return envelope addressed to William J. Cogan as Counsel for the Committee.

This declaration comprises pages 1 to 3 consecutively.

The following exhibits:

Letter of Solicitation.

Copy of Opinion and Order of Commission.

Authorization.

This declaration is made pursuant to the requirements of the Public Utility Holding Company Act

of 1935 and is executed by Russell M. VanKirk as Chairman of the Committee.

/s/ RUSSELL M. VanKIRK,
By /s/ WILLIAM J. COGAN,
Attorney.

Subscribed and sworn to before me at New York this 28th day of July, 1947.

/s/ ALICE L. NORMAN,
Notary Public, State of New York.

Commission expires March 30, 1949.

Stockholders' Protective Committee
Prior Preference—6% Cumulative Capital Stock of the
Market Street Railway Company of San Francisco
37 Wall Street—New York 5, N. Y.
Room 2508

(Date)

RUSSELL M. VanKIRK
Chairman

EDMUND T. WILLETTS
Treasurer

JOHN H. VanKIRK
Secretary

WILLIAM J. COGAN
Counsel

To: (Stockholder)

You will be interested to know that a Stockholders' Protective Committee has been formed to assert and protect the legal and equitable rights of Prior

Preference Stockholders of Market Street Railway Company.

After a preliminary survey made by William J. Cogan, as counsel, it was concluded that an alleged open account claimed by Standard Gas and Electric Company in a sum upwards of $1,000,000 vs. Market Street Railway Company was invalid and in fraud of the rights of the Prior Preference Stockholders, since it arose in connection with management fees and charges of no value to Market Street Railway Company, paid out and incurred for the use and benefit of Standard Gas & Electric Company which controlled Market Street Railway Company, through ownership of shares of first preferred, second preferred and common stock of Market Street Railway Company.

A friendly suit was started by Standard Gas & Electric Company against Market Street Railway Company in the United States District Court in California to secure a judgment on its open account of upwards of $1,000,000, which is not seriously contested by Market Street Railway Company.

Upon application by this Committee, the Securities and Exchange Commission, by order dated May 20, 1937, directed an investigation of the relationships between Market Street Railway Company, Standard Gas and Electric Company, et al., and of the facts and circumstances concerning charges for services made by Byllesby Engineering and Management Corporation against Market Street Railway Company and the relationship of such charges to an open account existing between Standard Gas & Electric Co. and Market Street Railway Company.

The Securities and Exchange Commission, by order dated July 3, 1947, directed Market Street Railway Company to provide this Committee with a list of its Prior Preference Stockholders and a copy of said order and of the opinion of the Securities and Exchange Commission, stated in connection therewith, is enclosed for your information.

Standard Gas and Electric Company has challenged the jurisdiction of the Securities and Exchange Commission in an attempt to avoid such investigation, and to force your Committee to use the United States Court in California as the exclusive forum. The Commission has denied a motion to vacate its order of May 20, 1947, and the present status of the matter is that a hearing is scheduled before the Securities and Exchange Commission to be continued on August 6th, 1947.

The Committee invites all of the holders and owners of 6% Cumulative Prior Preference Capital Stock of Market Street Railway Company (which is the only class of stock for which any assets are available) to authorize the Committee to represent them in such manner as the Committee may be advised will best serve the interests of the Prior Preference Stockholders, and in such form as may be necessary or desirable, to develop and prove the facts which the Committee believes to be true.

A form of authorization is herewith enclosed for your signature, and a return envelope is also enclosed, which will require a stamp before mailing.

It is difficult at this time to estimate the amount of the expenses necessary to properly develop and

present the matter. However, for the present, the Committee is providing such necessary expense money.

You are informed that the Committee has no motive in soliciting your participation other than the wish to present a united front, to the end that the Standard Gas and Electric Company may be prevented from taking upwards of $1,000,000 from the treasury of Market Street Railway Company which rightfully belongs to the Prior Preference Stockholders and that said Standard Gas and Electric Company or any affiliate or subsidiary thereof may in addition thereto be directed to pay to, or for, said Prior Preference Stockholders the sum of Six Hundred Thousand Dollars ($600,000.00) or some approximate sum, as the evidence to be adduced may indicate is properly due such stockholders with interest for monies improperly paid out for alleged management fees.

Very truly yours,

RUSSELL M. VanKIRK,
37 Wall St., N.Y.

BLOOMFIELD HULICK,
West Allenhurst, N.J.

EDMUND T. WILLETTS,
108 Greenwich St., N.Y.

. . . .

Russell M. VanKirk,
Chairman.

Enclosures

Received and filed July 29, 1947, U. S. Securities and Exchange Commission.

STOCKHOLDERS' EXHIBIT No. 48

William J. Cogan
Counselor at Law
116 John Street, New York 7, N. Y.
Cortlandt 7-2451

September 2, 1947.

Hon. Richard Townsend,
Trial Examiner,
Securities and Exchange Commission,
18th & Locust Streets,
Philadelphia, Pa.

Re: Market Street Railway Co., Docket No. 4-63

Dear Mr. Townsend:

I request the issuance of three subpoenas duces tecum, addressed to The Byllesby Corporation, Byllesby Engineering and Management Corporation (now Public Utility Engineering and Service Corporation) and Standard Gas and Electric Company, respectively.

The material to be produced is presented to you herewith.

I consider that the production of such records is necessary for use in the investigation being conducted by the Commission, for the reasons hereinafter stated.

The subpoena addressed to The Byllesby Corporation is necessary and the material called for is pertinent, because if it paid dividends to its stockholders (control of H.M.B.Co. and S.G.&E., being already shown on the record) it will prove that

directors Kahn, O'Brien and Erickson had an additional financial interest adverse to the interest of Market Street Railway Company, besides the ones already set forth on the record.

The subpoena addressed to Byllesby Engineering and Management Corporation, is necessary and the material called for is pertinent, since (1) The corporation admits in Comm. Exh. 81 that prior to June 1, 1939, no cost records were kept, and in the absence of such cost figures the over all picture must be presented to lend even a color of value, even if vaguely comparative for the services alleged as rendered Market Street Railway Co. (2) It appears from Comm. Exh. 79 that Byllesby Engineering and Management Corporation paid to Standard Power and Light Corp., $270,000 from the fees paid by Market Street to it. Oddly enough, this is 40% of such fees during the period Standard Power and Light Corporation owned 40% of the Junior securities. In addition to indicating a gross exaction of tribute, such a payment raises the further question of further possible diversion of such fees and of other similar fees; (3) The Market Street management has stated what it considers the services to have been rendered and perhaps Byllesby Engineering would accept the chance to restate them; (4) A statement of all executive salaries for all companies including all parents would serve as some basis for comparison, especially with their respective status set forth; (5) If a large percentage of all charges went to Standard Gas and Electric Company, as dividends, it tends to show the absence of

value and at least will show the excess of charges over the amount shown on their books as cost of operations; (6) The record already shows the control factor and the duplication of directors as well as the failure to inform the stockholders and while, in the absence of ability to prove cost figures, I feel that the right of Market Street Railway Company to the return of the entire $1,562,500, with interest in like amount, is already proven, the full facts should nevertheless be developed.

The subpoena addressed to Standard Gas and Electric Company is necessary and the material called for is pertinent, since presumably in view of the testimony of Samuel Kahn, Standard issued instructions in November, 1925, regarding selection of a successor to Mason B. Starring, as Executive officer of Market Street Railway Company, before the resignation of Starring; also presumably Standard issued further instructions from time to time which should be reflected in the correspondence; Since Samuel Kahn was not able to locate correspondence referred to in two letters and since he was the Coast representative of the group, if it now appears from Standard correspondence that Samuel Kahn was engaged in a variety of services for a variety of companies, it would have a bearing on the nature and extent of his services to Market Street.

At the close of the hearing on August 28, 1947, I requested a direction for the production of a statement of the entire receipts of Byllesby Engineering and Management for the years 1930 to 1936. At that time Mr. Hanson, representing only Standard

Gas and Electric Company stated he wished to confer with his client before indicating whether or not it would be produced by his client.

You will observe that the material I now request for production pursuant to subpoena is largely from Byllesby Engineering and Management Corporation. Since that corporation is not represented by Counsel in the proceeding, if we continue the fiction that it is separable from Standard, it would appear to save time and do no harm to any party to the proceeding to ensure the production of the records by subpoena.

The stockholders Committee agrees to become liable for any subpoena fees which may result from the issuance of the subpoenas requested.

Very truly yours,

/s/WILLIAM J. COGAN,
Attorney for Committee.

Before the Securities and Exchange Commission

[Title of Cause.]

Memorandum in Opposition to Motion of Public Utility Engineering and Service Corporation to Quash Subpoena

October 6, 1947.

Public Utility Engineering and Service Corporation (formerly Byllesby Engineering and Management Corporation) has moved to quash a subpoena

issued by Mr. Richard Townsend, Hearing Officer, on September 2, 1947, which was served on September 4, 1947.

The grounds stated for said motion are (1) that the material called for is not within the scope of the order of the Commission, dated May 20, 1947, and (2) that the subpoena is vague and general in its "requests" and thereby violated the Fourth Amendment and the provisions in the Constitution with respect to due process of law and (3) that the subpoena represents an unreasonable search and seizure.

In its brief, Public Utility Engineering and Service Corporation (p. 5) excepts paragraphs 1, 2, 3, 8, 9 and 10 of the subpoena from the objections and grounds otherwise asserted.

Reference is made to pp. 466-485 of the record as if herein set forth, for arguments presented before the Trial Examiner in support of the propriety and relevency of the subpoena. Reference is further made to the practical limitation by Counsel, Mr. Hansen, at p. 485, as follows:

> "I might say that leaves items 4 and 5 as being bad in our opinion and subject either to the motion to quash or in the alternative that they be either stricken or limited in their scope."

Moreover, Counsel for Public Utility Engineering and Service Corporation complained to Mr. Thomas Hart, Regional Administrator for the Commission in Chicago on the time element and his letter to the Trial Examiner states that the Corporation intended to comply with the subpoena.

No doubt, in presenting and arguing this motion Public Utility Engineering and Service Corporation (formerly Byllesby Engineering and Management Corporation) would prefer to avoid reference to various salient facts already developed on the record, since it is by reason of many of these facts that it has now become relevant in this proceeding to have the material called for by the subpoena produced. An appendix hereto sets forth 24 items considered by counsel for the Committee as proven by the record and which formed the basis for requesting the subpoena now questioned. If their record or exhibit reference is deemed necessary it can readily be provided and it is not set forth therein to avoid any indication that any findings of fact are sought at this time, either directly or indirectly. It is however claimed that such statement indicates the propriety and relevance of the material now sought.

The record now has gross figures on receipts by Byllesby Engineering and Management Corporation from 1919-1929, together with such breakdown as was available in 1932 and they graphically show that all executives of the Standard System were having a "field day" for themselves at the expense of the subsidiary and affiliated companies of the system.

The fact that the material now sought by the subpoena and so determinedly fought by Counsel for the Standard System, would show how much of a field day was actually had, is not a valid reason for failing to honor the subpoena, but in all proba-

bility is the main actuating reason for the contest.

In an attempt to boil down the contention of Counsel presenting this motion, to the prime factors, it appears that the Company feels that if compelled to provide a statement of all receipts allocating the source thereof, together with a breakdown of salaries for the years 1925-1935, and also to describe the various contracts, together with a statement of gross income each year of each client company, it is being subjected to unwarranted search and seizure. Apart from this it seems willing to comply.

Since Commission's Exhibit 81 shows that no cost figures were kept by Byllesby Engineering and Management Corporation up to 1939 and all of the foregoing material would be germane to some extent in analyzing the charges assessed against Market Street Railway Company, it is difficult to understand why it is considered "unreasonable."

The record, as it stands shows that a scheme to defraud Market Street Railway Company was instituted by Samuel Kahn and Halford Erickson, et als., on behalf of the several corporations to which they owed allegiance and of course, on behalf of themselves and associates.

Whether or not such scheme was part of a larger, more comprehensive scheme is properly the subject of evidence within the language of any paragraph of the Commission order of investigation dated May 20, 1947, and the production of the material called for by the subpoena will show or tend to show whether or not such larger scheme existed and en-

compassed as part thereof Market Street Railway Company. This alone would be sufficient warrant to deny the motion to quash the subpoena.

Certainly, it becomes relevant to the picture as applied to Market Street Railway Company charges to get total cost figures and the facts concerning all segments of distribution of the spoils.

There Is No Proper Basis for Quashing the Subpoena Herein

The following is a quote from the opinion of L. Hand, Circuit Judge in McMann v. S.E.C., 87 F. (2d) 377, 379 (Cert. Den. 301 U.S. 684):

> "No doubt a subpoena may be so onerous as to constitute an unreasonable search. Hale v. Henkel, 201 U. S. 43, 26 S. Ct. 370, 50 L. Ed. 652; Federal Trade Commission v. American Tobacco Company, 264 U. S. 298, 44 S. Ct. 336, 68 L. Ed. 696, 32 A.L.R. 786. Even then, the sanction is unobjectionable, unlike a descent upon one's dwelling, or the seizure of one's papers; the search is 'unreasonable' only because it is out of proportion to the end sought, as when the person served is required to fetch all his books at once to an exploratory investigation whose purposes and limits can be determined only as it proceeds."

It is contended that the instant case is far removed from the tpye of "unreasonable search" used as an example by Judge Hand.

Where a showing of relevence has been made and where the material called for is readily identifiable the Supreme Court has made it clear that a subpoena, even though broad in scope meets the requirements of the Fourth Amendment to the Constitution of the United States.

Wheeler v. U. S.,
226 U. S. 478 (1913);
Brown v. U. S.,
276 U. S. 134 (1928).

There can be no doubt of the relevency of the material called for by the subpoena and no claim has been made that such material is not identifiable.

It is axiomatic that a corporate officer or director may not place himself under any direct and powerful inducement to disregard his duty to the corporation and its stickholders in the management of corporate affairs.

See also—

Ashman v. Miller,
101 F. (2d) 85, 91 (CCA. 6th. 1929);
Henry L. Doherty & Co. v. Rice,
184 Fed. 204, 218 (N. D., Ala. 1910),
186 Fed. 878 (CCA. 8th. 1911).

Conclusion

It is submitted that each and all of the objections and grounds for the motion by Public Utility Engineering and Service Corporation to quash the subpoena served upon it on September 4, 1947, are

without merit and that the motion should be denied, with a date set for compliance.

Respectfully Submitted,

/s/ WILLIAM J. COGAN,
Attorney for Prior Preference Stockholders' Committee, Market Street Railway Company.

Appendix

Indicated Facts Taken From Record and Exhibits

1. Market Street Railway Company was subject to the control of Standard Gas and Electric Company since 1925.

2. Byllesby Engineering and Management Corporation was a wholly owned subsidiary of Standard Gas and Electric Company from its incorporation in 1919 to 1935.

3. From and after 1919 Standard Gas and Electric Company caused its subsidiaries and affiliates to make and enter into management contracts and/or engineering contracts with Byllesby Engineering and Management Corporation, its standard charge being 2½% of gross receipts on management contracts and 7½% on engineering contracts.

4. That in and prior to 1925 Samuel Kahn was an employee of Byllesby Engineering and Management Corporation and was also a director of Standard Gas and Electric Company.

5. In the latter part of 1925 Samuel Kahn was directed by Byllesby Engineering and Management

Corporation to become a director of and principal officer of Market Street Railway Company and he became such.

6. Byllesby Engineering and Management Corporation paid Samuel Kahn a salary and bonus from 1925-1935, during all of which time he was a director and the principal executive officer of Market Street Railway Company.

7. From 1925-1935 Samuel Kahn owed his principal loyalty to Byllesby Engineering and Management Corporation.

8. In 1925, following the death of H. M. Byllesby, various executive officers of the Standard system formed The Byllesby Corporation for the purpose of acquiring control of H. M. Byllesby & Co., and Standard Gas and Electric Company. They purchased the "B" stock which had sole voting power. The Corporation shortly thereafter acquired control of H. M. Byllesby & Co. Among other subscribers was J. J. O'Brien who was the principal officer of practically the entire Standard system and Samuel Kahn.

9. From 1925 to date the 39 plus per cent of junior voting stock of Market Street Railway Company controlled by Standard Gas and Electric Company was voted in favor of the Kahn board and at no time would a quorum be present without this stock.

10. The first arrangement for the payment by Market Street Railway Company to Byllesby Engi-

neering and Management Corporation of so-called management fees for the year 1926 was made in December, 1926, pro tunc, at a figure of $125,000, for the year.

11. Samuel Kahn, executive Vice-President of Market Street Railway Company, and Director thereof, who was also a Director of Standard Gas and Electric Company and two of its subsidiaries acted on behalf of Market Street Railway Company, while Halford Erickson, a Director of Market Street Railway Company and a Director and V. P. of Standard Gas and Electric Company and an officer of 16 subsidiary companies, President of six and Director of 12 such companies of the Standard system, acting in his capacity of Vice-President in charge of operations of Byllesby Engineering and Management Corporation, acted on behalf of that company.

12. To avoid criticism, it was arranged between Samuel Kahn and Halford Erickson (after a bill was sent for $125,000) to send a corrected bill to Market Street Railway Company in the sum of $30,000, for the year 1926. This was done and the bill paid. In 1927 pursuant to arrangement an additional bill for 1926 was sent for $95,000. This was paid and charged to surplus.

13. Market Street Railway Company paid to Byllesby Engineering and Management Corporation $1,565,000, from 1926 to 1935 for alleged management.

14. Byllesby Engineering and Management Corporation kept no record of cost figures for services rendered any company up to 1939.

15. The year 1924 was the last year any dividend was paid to prior preference stockholders of Market Street Railway Company.

16. Standard Gas and Electric Company borrowed $300,000, from Market Street Railway Company in 1926. It liquidated part of such debt by assuming payment of fees charged by Byllesby Engineering and Management Corporation in 1927.

17. Standard Gas and Electric Company and Byllesby Engineering and Management Corporation had the same executive officers, offices and principal employees.

18. From 1919-1929 Standard Gas and Electric received the sum of $16,986,776.15 from total net earnings of Byllesby Engineering and Management Corporation of $17,134,824.36.

19. Byllesby Engineering and Management Corporation paid Standard Power and Light Corporation from money it received from Market Street Railway Company the sum of $270,000 between 1926 and 1929.

20. Standard Power and Light Corporation was formed in Delaware in June, 1925, pursuant to agreement between H. M. Byllesby & Co., Standard Gas and Electric Company and Ladenburg Thalmann & Co. in connection with the acquisition of properties, including a 39.65% interest in the Junior securities of Market Street Railway Company.

21. In March, 1946, a contract was made between H. M. Byllesby & Co., Standard Gas and Electric Company and Ladenburg Thalmann & Co., which among other things required that Standard Power and Light Corporation should either own the management corporation serving the properties which were the subject of the contract or be paid a penalty.

22. The net income of Byllesby Engineering and Management Corporation was $978,000 in 1919, slightly under $949,000 in 1920. Thereafter it was upwards of $1,000,000 each year and in 1925 was upwards of $2,200,000 and more than $2,000,000 in 1927. (This shows momentum.)

23. The chief item of expense to Byllesby Engineering and Management Corporation from 1919 to 1929 was salaries.

24. Salary charges for 1919 were $137,000.

Salary charges for 1929 were $1,027,800.

Salary charges for 1919-1929 were $5,683,400.36.

Salary charges of Byllesby Engineering and Management Corporation for the period of 1919-1929 accounted for 75.04% of all expenses.

Received October 8, 1947, U. S. Securities and Exchange Commission.

In the United States District Court for the Northern District of California, Southern Division

No. 26807-R

STANDARD GAS AND ELECTRIC COMPANY,
Plaintiff,

vs.

MARKET STREET RAILWAY COMPANY,
Defendant.

LEA ROSEN on Her Own Behalf and on Behalf of all Other Holders of Prior Preference Stock of Market Street Railway Company Similarly Situated,
Defendant-Intervenor.

AFFIDAVIT IN SUPPORT OF MOTION FOR ORDER AUTHORIZING SETTLEMENT

State of California,
City and County of San Francisco—ss.

William J. Cogan, being first duly sworn, deposes and says:

That he is an attorney and counselor at law duly admitted to practice as such in the State of New Jersey and the State of New York and in the United States District Court, District of New Jersey, and in the United States Circuit Court of Appeals, Third Circuit, with his principal office at 32 Liberty Street, New York 5, N. Y.

That he has been authorized by John H. Van Kirk, holder and owner of shares of prior prefer-

ence stock of Market Street Railway Company, and by a stockholders' protective committee for said stock, which in turn represents 152 such stockholders owning 36,527 shares of prior preference stock of Market Street Railway Company, to appear in this matter as attorney on their behalf and to take such action as seems necessary or proper.

The affidavit of John H. Van Kirk, duly executed in New York City on the 2nd day of March, 1948, is submitted herewith, and on or before March 15th, 1948, deponent will file in this Court a photostatic copy of the respective authorizations given the aforesaid Committee by the respective stockholders above referred to.

Standard Gas and Electric Company, plaintiff herein, and Market Street Railway Company, defendant herein, propose to settle the above-entitled action wherein Standard sought judgment for $1,069,063.30, with interest from December 31st, 1946, by payment of the sum of $550,000 to Standard in full settlement of its open account. As part of such settlement Standard Gas and Electric Company will pay to deponent $25,000 as a legal fee, and to John H. Van Kirk, et als., as compensation for the stockholders' protective committee, the sum of $12,500. Market Street Railway Company will pay deponent $25,000 as a legal fee, and will pay the said Committee $12,500 and such further sum as represents the expenses of the Committee not to exceed $5,000, which as of now appears to be $2,500.

A motion is on the calendar of this Court for

Monday, March 15th, 1948, made by Lea Rosen, defendant-intervenor, for an order to take proof or reference to a Master, pursuant to Rule 53 respecting the fairness and adequacy of a proposed settlement, the terms of which are correctly set forth in the said moving papers, except that the settlement of this action was arranged on a purely money basis and the provision for the selection of a majority of the Board of Directors of Market Street Railway Company represents simply a concession that Standard Gas and Electric Company, as controlling stockholder, is ready and willing to make to the clients represented by deponent.

The settlement referred to by Lea Rosen in her motion was arranged on or about December 6, 1947, between Standard Gas and Electric Company, Market Street Railway Company, and the said stockholders' protective committee represented by deponent, and, as aforesaid, when said settlement was arranged the Committee represented 152 stockholders owning 36,537 such prior preference shares.

A second motion is scheduled to be placed on the calendar for March 15, 1948, with reference to the same subject matter and to be made by Standard Gas and Electric Company and Market Street Railway Company jointly, to pray for an order authorizing the completion of the settlement of the above-entitled action without any reference to a Master. The present status of the matter presents no involved situation, no complicated litigation, but only whether a settlement on an approximate 50% basis, which will avoid protracted litigation and which

was made for a substantial number of the stockholders by said Committee, is fair and reasonable.

It appears to deponent that in the event this matter actually came to trial and was not settled and compromised, the sole issue would be whether or not Standard Gas and Electric Company violated a fiduciary duty by causing Market Street Railway Company to pay the management fees it did pay to Byllesby Engineering and Management Corporation from 1926 to 1935 and, if so, to what extent it profited from such breach of fiduciary duty.

The motion returnable on March 15, 1948, made by Lea Rosen, evidently shows that neither she nor her two counsel object to the settlement inasmuch as they specifically set forth that they express no opinion on the fairness and adequacy thereof, and it would appear that the best interests of the parties involved would be served by merely considering the motion made by Standard Gas and Electric Company and Market Street Railway Company jointly.

The following facts are submitted for the consideration of this Court as pertinent to the application for leave to settle this matter:

Russell M. Van Kirk, now deceased, was the owner, directly and indirectly, of upwards of 11,000 shares of prior preference stock of Market Street Railway Company which he acquired in 1942 and 1943.

In 1943 Standard Gas and Electric Company

sought and secured from Securities and Exchange Commission the right to sell its open account against Market Street Railway Company, then upwards of $1,000,000, and its junior securities of Market Street Railway Company amounting to 39.67% of the voting stock and representing control of said Company, all for the sum of $800,000, but such sale was never completed.

Early in 1946 deponent was consulted by the said Russell M. Van Kirk concerning the possibility of persuading the Securities and Exchange Commission to question the validity of the open account existing between Standard Gas and Electric Company and Market Street Railway Company since 1926, which the management of Market Street Railway Company admitted as substantially correct.

Attempts previously made by Russell M. Van Kirk to secure the aid of or action by S.E.C. were unsuccessful both in 1945 and 1946, since he could provide no facts but only express suspicions.

The advice of deponent was to secure some concession from Standard Gas and Electric Company, if possible, by writing to state his intention to retain the services of deponent unless a satisfactory adjustment was made. A conference was scheduled between Leo Crowley, President of Standard Gas and Electric Company, and Russell M. Van Kirk, but was not held. Instead, Standard Gas and Electric Company started this action on January 12, 1947, and Russell M. Van Kirk then asked deponent for advice upon the desirability of intervention.

The advice given by deponent to Russell M. Van Kirk was to the effect that any questionable part of the open account would in all probability be prior to the effective date of the Public Utility Holding Company Act of 1935, in which case the statute of limitations might well be invoked. For the purpose of considering such possibility, deponent examined the law of the State of California to a limited extent and found, among other cases, a decision by the United States District Court, Judge Yankwich, which contained an analysis of the application of the statute and indicated the law as applied in California to require that any complaint charging fraud must contain allegations when the fraud was discovered; the circumstances under which it was discovered; the facts to show plaintiff was not at fault in failing to discover the fraud sooner; and that plaintiff has no actual or presumptive knowledge of facts sufficient to put him on inquiry.

At the time Russell M. Van Kirk, and, as far as we now know, no other stockholder of Market Street Railway Company, was in possession of any facts and was not in position to properly allege any fraud or breach of fiduciary duty, or was in possession of any facts from which a reasonable inference of fraud or breach of fiduciary duty could be drawn.

It was then concluded as best procedure to find a basis for action by the Securities and Exchange Commission and, if successful in that respect, to

ask that Standard Gas and Electric Company be stayed from proceeding in this action.

Between January and March, 1947, deponent made, and caused to be made, an exhaustive examination of the records, reports, etc., filed in the office of Securities and Exchange Commission and finally found an item indicated as payment of management fee, which was charged to "surplus" on the records of Market Street Railway Company. This and other facts were the basis of a petition and amended petition filed by deponent with Securities and Exchange Commission in March and April, 1947. Thereafter and on May 20, 1947, the Securities and Exchange Commission made two orders, one of which directed Market Street Railway Company to show cause why it should not provide a stockholders list, and the second of which, was made pursuant to Sections 11(a), 18(a) and 18(b) of the Public Utility Holding Company Act of 1935, 15 U.S.C. Secs. 79K(a), 79R(a) and 79R(b), which said order directed that hearings be had upon and that an investigation be made of the relationships between Standard Gas and Electric Company, its wholly owned subsidiary Byllesby Engineering and Management Corporation, and Market Street Railway Company, including the origin and status of an open account on the books of Market Street Railway Company in favor of Standard Gas and Electric Company. The order enjoined Market Street Railway Company from making any payments to Standard Gas and Electric Company except after application to the Com-

mission and the entry of an order by the Commission approving any such payment. By order dated August 21, 1947, such payments were prohibited until sixty days after the record is closed, and said order is still in full force and effect.

Standard Gas and Electric Company and Byllesby Engineering and Management Corporation strenuously fought the jurisdiction of the Securities and Exchange Commission by petition and oral argument befort it and by motion argued before the United States Circuit Court of Appeals, Third Circuit, made on the ground that the same issues were involved in the action brought in this Court. Such motion was denied by the said Circuit Court of Appeals.

Following the said order of May 20, 1947, Leo Crowley, President of Standard Gas and Electric Company, made an offer to Russell M. Van Kirk, chairman of said stockholders' committee, to reduce the amount of the open account to $800,000, which was refused.

Testimony was taken before the Securities and Exchange Commission between June and December, 1947, comprising 664 pages.

Milton Paulson, of counsel with Dreyfus & McTernan in this action, intervened before the Securities and Exchange Commission on behalf of Lea Rosen, the defendant-intervenor in this case, and was either present or represented by an attorney at all sessions before the Securities and Exchange Commission without active participation in the development of the facts. However, he is fully fami-

liar with the record, and while he expressed neither agreement nor disagreement with the terms of the proposed settlement forth on the records of the S.E.C. on December 9, 1947, and has likewise expressed neither agreement nor disagreement with the settlement in this Court, his attitude might properly be accepted as considering the settlement to be fair and reasonable.

The material used in the amended answer filed by Lea Rosen in this action appears to be an adaptation of the pertinent material contained in the petition and amended petition filed by deponent with Securities and Exchange Commission, and, as far as deponent is aware, said Lea Rosen and her counsel are not in possession of any facts not already developed on the record of the S.E.C.

To summarize what appears to be developed on the record of the S.E.C. as facts which Standard Gas and Electric Company could not controvert and which entered into consideration in the negotiations which led to the proposed settlement and which might properly be considered by this Court in connection with the motion to authorize said settlement include the following:

(a) Standard controlled Market Street since 1925 through ownership of 39.67% of its voting stock;

(b) Byllesby Engineering and Management Corporation was the wholly owned subsidiary of Standard;

(c) Standard Gas and Electric Company caused Market Street Railway Company to en-

gage the management services of Byllesby Engineering and Management Corporation;

(d) From 1926 to 1935 Samuel Kahn, President and Director of Market Street Railway Company, was an employee of and was paid by Byllesby Engineering and Management Corporation;

(e) Market Street Railway Company paid Byllesby Engineering and Management Corporation for management services between 1926 and 1935 $1,565,000;

(f) All net earnings of Byllesby Engineering and Management Corporation which it received from the various companies of the Standard system for management during said period were paid to Standard Gas and Electric Company;

(g) Standard profited from the fees paid to Byllesby by Market Street Railway Company.

The hearings before the Securities and Exchange Commission were suspended on December 9, 1947, subject to further call by the Commission or by the Trial Examiner, Richard Townsend.

At the time such hearings were suspended, Standard Gas and Electric Company had not offered its evidence concerning the value of the services rendered to Market Street Railway Company by Byllesby Engineering and Management Corporation and, accordingly, it is difficult to predict what the outcome of a trial would be, assuming that the settlement arrived at was not accepted.

The considerations leading to the proposed settlement, which was the result of several conferences on the subject included the fact that certain victory in the full amount off-setting the balance claimed by Standard Gas and Electric Company on its open account could not in any event be assured; secondly, the settlement effects a saving for Market Street Railway Company in a sum slightly in excess of that which would be paid to Standard under the terms of the settlement; and, third, Market Street Railway Company is in process of liquidation and is scheduled to receive the balance of the sale price for its operative properties from the City and County of San Francisco in May, 1948; and, fourth, it would appear to serve the best interests of all prior preference stockholders, including the defendant-intervenor, to avoid protracted litigation on the subject and to learn at an early date what sum may reasonably be expected to be available for distribution to the prior preference stockholders upon the early partial completion of the liquidation.

This affidavit is made solely for the purpose of supporting the proposed settlement and in the hope that it will provide the Court with enough facts to warrant the Court in accepting the proposed settlement without further proof.

For the present, apart from asking the Court to intervene in this matter, as attorney for the aforesaid stockholders' committee and the 152 stockholders it represents owning 36,537 prior preference shares, application for leave to answer is with-

held pending decision of the Court on the motions to be presented on March 15, 1948.

/s/ WILLIAM J. COGAN.

Subscribed and sworn to before me this 11th day of March, 1948.

[Seal]: /s/ EUGENE P. JONES,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed March 11, 1948, U.S.D.C.

United States of America Before the Securities and Exchange Commission

At a regular session of the Securities and Exchange Commission held at its office in the City of Washington, D. C., on the 11th day of June, 1948.

In the Matter of

MARKET STREET RAILWAY COMPANY AND STANDARD GAS AND ELECTRIC COMPANY AND CERTAIN OF ITS SUBSIDIARY COMPANIES

File No. 4-63

RUSSELL M. VAN KIRK, BLOOMFIELD HULICK, EDMUND T. WILLETTS, COMMITTEE FOR THE MARKET STREET RAILWAY COMPANY PRIOR PREFERENCE CAPITAL STOCK

File No. 68-84

MARKET STREET RAILWAY COMPANY

File No. 54-169

(Public Utility Holding Company Act of 1935)

NOTICE OF FILING OF SECTION 11(e) PLAN AND NOTICE OF AND ORDER FOR HEARING AND ORDER OF CONSOLIDATION

I.

The Commission, on May 20, 1947, issued its order pursuant to Sections 11(a), 18(a) and 18(b) of the Public Utility Holding Company Act of 1935 ("Act") requiring that public hearings be held for the purpose of inquiring into and receiving evidence concerning the relationships among Standard Gas and Electric Company ("Standard Gas"), a registered holding company, and its subsidiaries, Market Street Railway Company ("Market Street"), and Public Utility Engineering and Service Corporation (formerly known as Byllesby Engineering and Service Company), the character of the interest of Standard Gas in Market Street, and particularly the facts and circumstances giving rise to an open account on the books of Market Street in favor of Standard Gas, all as fully set forth in Holding Company Act Release No. 7425. Pursuant to that order, hearings have been held from time to time and are presently in adjournment, subject to the call of the hearing officer.

There is presently pending in the District Court

of the United States for the Northern District of California, Southern Division, an action (Civil Action No. 26807-R) brought by Standard Gas against Market Street upon open account indebtedness on the books of Market Street owing to Standard Gas in the amount of $976,726.63. Standard Gas' claim in this action aggregates, with interest, the sum of $1,111,494.67, the difference of $134,768.04 resulting from Market Street having accrued interest at the rate of 4% per annum, whereas Standard Gas accrued interest at the rate of 6% per annum. Russell M. Van Kirk, Bloomfield Hulick and Edmund T. Willetts, as a Committee for the Market Street Railway Company Prior Preference Capital Stock ("Committee"), have appeared in said action and Lea Rosen, a holder of Prior Preference Stock, has filed a petition for leave to intervene in the action. As part of the plan hereinafter summarized, Market Street, Standard Gas and the Committee have agreed upon a settlement of the above-mentioned open account indebtedness and the litigation with respect thereto instituted by Standard Gas.

Notice Is Hereby Given that Market Street has filed with the Commission a plan pursuant to Section 11(e) providing, in effect, for a distribution of its assets and its ultimate liquidation and dissolution.

All interested persons are referred to the plan which is on file in the offices of this Commission for a statement of the transactions proposed. There follows a summary of certain facts necessary to an

understanding of the plan and a summary of the provisions of the plan.

II.

Market Street is a corporation organized under the laws of the State of California. It was engaged in the business of operating a street railway transportation system until the year 1944 when it sold its major physical assets to the City of San Francisco, California. Since that time it has been in the process of liquidation.

As at December 31, 1947, Market Street had an open account indebtedness due Standard Gas of $976,726.63. In addition there were outstanding the following securities:

Name of Security	No. of Shares Outstanding	Amount	Arrears	
			Per Share	Amount
Prior Preference 6% Cumulative Stock, $100 par value	116,185	$11,618,500	$154.50	$17,950,582.50
Preferred 6% Cumulative Stock, $100 par value	49,868½	4,986,850	160.50	8,003,894.25
Second Preferred 6% Stock, $100 par value	46,737	4,673,700	....	....
Common Stock, $100 par value	106,474	10,674,400	....	....

All of the Prior Preference Stock is publicly held. Standard Gas owns 39,250 shares of Preferred Stock, 25,500 shares of Second Preferred Stock and all of the Common Stock; these holdings constitute 39.67% of the voting power of Market Street.

According to its balance sheet, as of December 31, 1947, Market Street's total assets amounted to $3,614,834.97, of which $1,919,232 represented the unpaid balance of the purchase price of its operating properties due from the City and County of San Francisco. As of the same date, Market Street had contingent liabilities with respect to 197 pending suits and claims for injuries and damages in which judgments were prayed for in the aggregate amount of $2,770,976.71, and certain claims for compensation and benefits arising from compensable injuries and death of former employees.

III.

In summary, the plan provides as follows:

1. Market Street will pay to Standard Gas the sum of $550,000; Standard Gas and Market Street will deliver to each other releases and discharges of any and all liability to each other for any cause whatsoever.

2. The attorney for the Committee will be paid $50,000, of which Market Street and Standard Gas will each pay $25,000.

3. The Committee will be paid $25,000, of which Market Street and Standard Gas will each pay $12,-

500. In addition, Market Street will reimburse the Committee for expenses in an amount estimated not to exceed $5,000.

4. Market Street will sell its remaining real estate and office furniture and fixtures.

5. Market Street will collect from the City and County of San Francisco the balance of the purchase price of its operating properties, together with interest thereon.

6. Market Street will dispose of all claims pending against it for injuries and damages, and all claims for workmen's compensation and benefits.

7. Market Street will pay such fees and expenses in connection with the plan as shall be approved by the Commission, with the proviso that the fees to be paid by Market Street to the Committee and its attorney shall not exceed the amounts provided in the plan.

8. After the foregoing steps have been taken, or provision for payment made, the remaining assets of Market Street will be distributed pro rata to the holders of its Prior Preference Stock.

9. Market Street has requested that the Commission, if it approves the plan, apply to a court, in accordance with Sections 11(e) and 18(f) of the Act, to enforce and carry out the plan. Upon the plan's becoming effective by a final order of the Commission and a final decree of court, it is provided in the plan that all rights of the holders of the Preferred Stock, Second Preferred Stock and

Common Stock of Market Street shall cease and terminate and such holders shall have no further rights to vote or participate in any distribution of the assets of Market Street upon liquidation.

10. Within 100 days after the plan has become effective, a special meeting of the holders of Prior Preference Stock will be held to elect a new Board of Directors. If such effective date occurs within 100 days of the next regular meeting of stockholders, no special meeting will be held and the new Board of Directors shall be elected at such next regular meeting.

IV.

The Commission being required by the provisions of Section 11(e) of the Act, before approving any plan thereunder, to find, after notice and opportunity for hearing, that the plan as submitted or as modified is necessary to effectuate the provisions of Section 11(b) of the Act, and is fair and equitable to the persons affected thereby, and it appearing appropriate to the Commission in the public interest and the interest of investors and consumers that a hearing be held with respect to the plan filed herein to afford all interested persons an opportunity to be heard with respect thereto; and

It appearing to the Commission that the proceedings in File Nos. 4-63 and 68-84 contain facts and data pertinent to the present proceeding and should be consolidated with the record concerning the plan filed herein:

It Is Ordered that the proceedings in File Nos. 4-63 and 68-84, entitled "Market Street Railway

Company, et al.," and "Russell M. Van Kirk, et al." respectively, be and the same hereby are consolidated with these proceedings (File No. 54-169).

It Is Further Ordered that a hearing in these consolidated proceedings be held on July 13, 1948, at 10:00 a.m., E.D.S.T., at the offices of the Securities and Exchange Commission, 425 Second Street, N.W., Washington 25, D. C. On that day the hearing room clerk in Room 101 will advise as to the room in which the hearing will be held

It Is Further Ordered that any person desiring to be heard in connection with these proceedings or proposing to intervene herein shall file with the Secretary of the Commission on or before July 9, 1948, his request or application therefor as provided by Rule XVII of the Commission's Rules of Practice. Such request shall set forth the nature of such person's interest in the proceedings, the reasons for requesting to be heard or to intervene, which of the issues such person proposes to controvert and a statement of any additional issues proposed to be raised in the proceedings herein.

It Is Further Ordered that Richard Townsend or any other officer or officers of the Commission designated by it for that purpose shall preside at the hearing above ordered. The officer so designated to preside at the hearing is hereby authorized to exercise all powers granted to the Commission under Section 18(c) of the Act and to a hearing officer under the Commission's Rules of Practice.

The Division of Public Utilities of the Commission having advised the Commission that it has made a preliminary examination of the plan and

that, upon the basis thereof, the following matters and questions are presented for consideration without prejudice to its specifying additional matters or questions upon further examination:

1. Whether the plan as submitted or as it may hereafter be modified is necessary to effectuate the provisions of Section 11(b) of the Act, and is fair and equitable to the persons affected thereby, and if not, in what respects said plan, including any modifications thereof, should be required to be modified and amended.

2. Whether the amount proposed to be paid by Market Street to Standard Gas by way of settlement is fair and equitable, and whether the treatment of the interests of Standard Gas in Market Street, as compared with those of other security holders in Market Street, is fair and equitable.

3. Whether the provisions in the plan relating to the election of a new Board of Directors are appropriate and in the best interests of all the holders of Prior Preference Stock of Market Street.

4. Whether the provision in the plan that the rights of the holders of Preferred Stock, Second Preferred Stock and Common Stock of Market Street shall cease and terminate is fair and equitable.

5. Whether the plan should be modified to provide that no other payments shall be made by Market Street until payment of or provision has been

made for all claims for injuries and damages and workmen's compensation and benefits.

6. Whether the Commission should approve the amounts proposed to be paid to the Committee and its attorney by way of reimbursement for expenses and allowances for legal and other services.

7. Generally, whether the proposed plan and transactions set forth therein are in all respects in the public interest and in the interest of investors and consumers, and consistent with all the applicable requirements of the Act and the Rules thereunder, and, if not, what modifications should be required to be made therein and what terms and conditions should be imposed to satisfy the applicable statutory standards:

It Is Further Ordered that at said hearing evidence shall be adduced with respect to the foregoing matters and questions.

It Is Further Ordered that jurisdiction be, and it hereby is, reserved to separate, either for hearing in whole or in part or for disposition either in whole or in part, any of the issues or questions set forth herein or which may arise in these proceedings, and to take such other action as may appear conducive to an orderly, prompt and economical disposition of the matters involved.

It Is Further Ordered that notice of said hearing be given by registered mail to Market Street Railway Company, Standard Gas and Electric Company, Public Utility Engineering and Service Company; William J. Cogan, Esq., Milton Paulson,

Esq., the California Railroad Commission, and the City of San Francisco, California; and that further notice shall be given by general release of this Commission which shall be distributed to the press and mailed to persons on the mailing list for releases under the Act; and that further notice be given to all persons by publication of this Notice and Order in the Federal Register.

It Is Further Ordered that Market Street shall give notice of said hearing to all its security holders by mailing a copy of this Notice and Order at least 15 days prior to the date set for hearing to each of its known security holders (in so far as the identity of such security holders is known or available to it), at his last known address, and that Market Street shall enclose therewith a statement that Market Street may modify its plan by amendment without further communication to security holders unless otherwise ordered by the Commission or unless information with respect to amendments is requested of Market Street by individual security holders.

[Seal]: /s/ ORVAL L. DuBOIS,

Secretary.

[Title of Cause.]

BRIEF OF COMMITTEE IN SUPPORT OF PLAN OF REORGANIZATION OF MARKET STREET RAILWAY COMPANY PURSUANT TO SECTION 11 (e), PUBLIC UTILITY HOLDING COMPANY ACT OF 1935.

Statement

Market Street Railway Company, a statutory subsidiary of Standard Gas and Electric Company, a registered holding company, has filed herein, under date of April 22, 1948, a plan for recapitalization, pursuant to the provisions of Section 11 (e) of the Public Utility Holding Company Act of 1935, for the purpose of enabling said company to comply with the provisions of Section 11 (b) of said Act.

Summarily stated, the plan provided for the compromise and settlement of an open account existing between Standard Gas and Electric Company and Market Street Railway Company on terms set forth therein; for the elimination of voting power and termination of all rights of the Preferred 6% cumulative stock, the Second Preferred 6% stock and the Common stock of Market Street Railway Company; reduction of the remaining assets to cash; disposition of all claims against Market Street Railway Company through settlement or otherwise, and the liquidation of Market Street Railway Company through distribution of all remaining assets and finally, dissolution of Market Street Railway Company.

By order of the Commission the proceeding with respect to the presentation of the plan filed pursuant to Section 11 (e) was consolidated with an investigation ordered by the Commission with reference to the principal subject matter of the plan on May 20, 1947, and the record of such combined proceeding as closed on July 21, 1948, and transmitted to the Commission, now comprises 1,029 pages while there are 119 Commission Exhibits, 62 Van Kirk Committee Exhibits and 23 Market Street Railway Company Exhibits. There are also 12 Paulson Exhibits which were placed in the record July 13 and 14, 1948 in support of his claim for fees.

Standard Gas and Electric Company and Public Utility Engineering and Service Corporation will, in the event the compromise contained in the 11 (e) plan is not authorized, ask leave to reopen the record to provide proof of management service and its value.

The plan is necessary to effectuate the provisions of Section 11 (b), in that:

1. The Commission made its original divestment order against Standard Gas and Electric Company on August 8, 1941. (Holding Company Act Release No. 2929). Included therein for divestment was Market Street Railway Company.

2. The Commission authorized Standard Gas and Electric Company by order dated December 15, 1943, to sell and dispose of the open account had by it against Market Street Railway Company to-

gether with shares of Preferred, Second Preferred and Common stock of Market Street Railway Company for the sum of $800,000. (Holding Company Act, Release No. 4765.)

3. Market Street Railway Company ceased to be an operating subsidiary on September 29, 1944, when it sold its street railway operative properties to the City and County of San Francisco for $7,500,000.

4. The total assets of Market Street Railway Company as of December 31, 1947, amounted to $3,614,834.97 while as of said date the principal sum due upon liquidation of the prior preference shares of stock was $11,618,500, together with arrears of cumulative dividends thereon of $17,950,-582.50.

5. The 49,868½ shares of Preferred 6% cumulative, 46,737 shares of Second Preferred 6% cumulative and 106,474 shares of common stock of Market Street Railway Company issued and outstanding have no intrinsic value and should be no longer entitled to the voting and other privileges they now enjoy.

6. The 116,185 shares of prior preference 6% cumulative capital stock of Market Street Railway Company should be entitled to the sole voting and other privileges attendant thereto. (Market Street Exhibit 20 re Stock and Assets.)

7. There is no reason to continue Market Street Railway Company as part of the Standard Gas and Electric System and no reason for the continued

existence of Market Street Railway Company beyond its orderly liquidation.

The plan is fair and equitable to the persons affected thereby.

Standard Gas and Electric Company and its stockholders and Market Street Railway Company and its prior preference stockholders are affected by the plan.

As of December 31, 1947, the open account of Standard Gas and Electric Company was carried on the books of Market Street Railway Company at $976,726.63 and as of January 20, 1947, Standard claimed $1,111,494.67. (Market Street Exhibit 20.) To estimate totals as of now, Market Street Railway Company would add interest at 4% while Standard Gas and Electric Company would add interest at 6%.

By the terms of the plan, Standard Gas and Electric Company would receive $512,500 net, since it has agreed to pay to William J. Cogan, a fee of $25,000 and to the Van Kirk Committee a fee of $12,500 and the proposed settlement based on Standard figures represents about 55% saving for Market Street Railway Company, amounting to about $3.00 per share on the prior preference stock of Market Street Railway Company. (R. 686.)

George Knourek, Vice President and Treasurer of Standard Gas and Electric Company testified his opinion that the settlement was fair to both Standard and Market Street, since the amount thereof was in line with the amount Standard was willing to accept in December, 1943, taking into considera-

tion $225,000 paid by Market Street in the interim and the concession approximating $300,000 it was willing to make in 1943. He indicated that he had some trouble selling the settlement to the Standard Board. He expressed the opinion that Standard could defend the claim, but this would involve extended litigation with large expenses and loss of time. (R. 777-778-782.)

Since the settlement as arranged was arrived at after negotiations between the representatives of Standard Gas and Electric Company and the Van Kirk Committee and its counsel, reference is made to testimony by William J. Cogan concerning its fairness:

> "In the first place, no case is a certainty. Standard was suing for $1,100,000 plus. They now receive actually $512,500. They are in position to offer evidence of value of the services which were rendered and might well be in a position to get a verdict for more than the $550,000 if the case was tried.
>
> As I say, no case is a certainty, and when you get a settlement of better than 50 per cent, I think it is desirable to take it."

No testimony was offered that the amount of the settlement is not fair and reasonable or not made pursuant to arms length bargaining, unless the stated position of Milton Paulson can be construed as such.

Voluminous testimony of a purely self-serving nature appears in the record of hearings held on

July 13 and 14, 1948, developed by Milton Paulson, attorney of record for Lea Rosen, owner of 300 shares of prior preference stock, all with relation to his fee presentation and only incidentally having relation to the fairness and reasonableness of the settlement itself. Insofar as the fairness and reasonableness is concerned, such testimony boils down to his stated conclusion that 50 per cent of the claim of Standard would be fair. (R. 858,894, 902) His stated conclusion that under other auspices the settlement could be improved enters the realm of pure speculation.

It remains a fact that the best offer made to him was $650,000 net as contrasted with the $512,500 net now presented and effected by the Van Kirk Committee and its counsel.

An additional reason for the conclusion that the plan is fair and reasonable lies in the fact that Market Street Railway Company, although saving $570,000 (R. 686), is only required by its terms to pay total fees of $37,500 and expenses up to $5000, the aggregate of which is slightly more than 7 per cent of the amount saved.

It is also true that a settlement at this time will facilitate the orderly liquidation of Market Street Railway Company, will determine to a degree the probable distribution per share of prior preference stock, and will tend to minimize the time within which such liquidation can be completed and thereby save some operating expense.

The compensation provided by the plan and asked by the Van Kirk Committee and its

counsel is fair and reasonable based upon services rendered and the benefit conferred upon Market Street Railway Company.

The rule of law consistently applied by the Commission, as well as by the courts, is aptly stated in Dickinson Industrial Site v. Cowan, 309 U. S. 382, 385, 389, 60 S. Ct. 595, 599, 84 L. Ed. 819, as follows:

> "Fee claimants are either officers of the Court or fiduciaries, whose claims for allowance from the estate are based only on services rendered to and benefits received by the estate. Allowance or disallowance involves an exercise of sound discretion by the court based upon that statutory standard."

See also In re Standard Gas and Electric Company, 26 F. Supp. 636, 643 Affd. 106 F. 2nd 215.

And for a few recent Commission decisions to the same effect, in Section 11 proceedings see:

Columbus Gas and Electric Corporation et. al. (1944) Holding Company Act. Release No. 5460.

The Laclede Gas Light Company, et al. (1947) Holding Company Act Release No. 7260.

Scranton-Spring Brook Water Service Company, et. al. (1948) Holding Company Act Release No. 8358.

Subsidiary considerations are time spent, ability and experience, difficulty of problems, local rates for similar services and necessity for the services.

The plan as presented provides that Standard Gas and Electric Company will pay to William J. Cogan, attorney, $25,000 and to the Van Kirk Committee, $12,500, and further provides that Market Street Railway Company will pay to William J. Cogan, attorney, $25,000 and to the Van Kirk Committee, $12,500, plus its expenses up to the sum of $5,000.

Measured both by the standard of services rendered to and of benefits received by Market Street Railway Company and also measured by various of the subsidiary considerations above set forth, the Van Kirk Committe and their counsel have no hesitancy in contending that the stated fees are fair and reasonable.

Market Street Railway Company by the settlement proposed saves the difference between $1,130,000 (as the approximate figure claimed by Standard) and $550,000 to be paid to Standard, or $580,000. It is also relieved of $37,500 in fees assumed by Standard, so it, in effect, saves $617,500.

It cannot be questioned that the investigation authorized and had by the Commission produced all of the facts which prompted Standard Gas and Electric Company to seek and to arrange the settlement.

The Commission investigation was initiated through the efforts of the Van Kirk Committee, which was set up in January, 1947 for the purpose of learning, preparing and submitting sufficient facts reflected upon the Standard Gas and Electric Company open account against Market Street Railway

Company to warrant the Commission proceeding under appropriate sections of the Act; of then vigorously proceeding in cooperation with the Commission staff to prove a defense to such open account, or such part thereof as represented profit on management fees. This was largely accomplished and the result is now before the Commission for authorization.

As background to the petitions filed by the Van Kirk Committee and before such filing, Russell M. Van Kirk, who was the principal member of the Committee, rendered service to Market Street Railway which reflects itself in the results accomplished. The record shows his participation in the proceeding which resulted in authorization for Standard to sell the open account for $800,000 and it was from this proceeding that his suspicions were aroused concerning the validity of the open account. He voiced such suspicions to the staff in 1945 and 1946, but had no facts to support him. Conferences were had during 1946 between Russell M. Van Kirk and William J. Cogan, and the file accumulated by Russell M. Van Kirk was examined with the hope that a basis might be established for a formal application for Commission action. In December, 1946 Russell M. Van Kirk attempted to arrange a conference with Leo Crowley to effect on behalf of Market Street Railway Company a suitable adjustment of the Standard claim, in the absence of which he would retain counsel to seek action before the Commission.

These activities provided the fulcrum for the actual Committee efforts and results.

It is reasonably certain that these preliminary efforts by Russell M. Van Kirk stimulated Standard to seek some means by which it could develop Res adjudicata on the account and to start its action in the United States District Court, and that only the action taken by the Commission prevented its consummation.

The Committee needed no formal meetings since Bloomfield Hulick was father-in-law of Russell M. Van Kirk and they lived nearby and the variety of conferences had between Russell M. Van Kirk and the Committee Attorney, William J. Cogan, extending over the period of January, 1947, when the Committee was formed, and December 5, 1947 when the settlement was formally arranged, were no doubt the subject of a similar variety of conferences between Russell M. Van Kirk and Bloomfield Hulick, to the end that the proceedings might be conducted in such manner as to accoplish a successful result.

In evaluating the services of the Committee, the fact that the proceeding instituted by the Commission had no precedent and offered more than the usual and customary problems confronting a committee, is an element of value in the services rendered; an assumed liability for expenses up to $5,000 is another; liability for subpoena fees for witnesses is another; conferences upon and the decision to urgently seek the jurisdiction of the Commission is another; arranging for counsel to appear in San Francisco to oppose the abortive attempt to switch jurisdiction is another; conference on settlement with Lea Crowley in April, 1947, conference

with Standard representatives in September, 1947, consideration as to when and in what manner to discuss settlement is another, although the activity of Milton Paulson affected this to a degree; consideration of the advisability of and finally accepting a settlement arrangement is last, but by no means least.

It may be observed that while Russell M. Van Kirk was the principal member of the Committee and rendered the major part of the tanglible services, he accepted an arrangement whereby the Van Kirk Committee was to receive the fee of $25,000. His death should cement the arrangement.

The Commission has in the past awardad a gross fee to a group which desired that arrangement, even though it was apparent that one or more rendered a disproportionate share of service, or accomplished a disproportionate successful result.

It is, therefore, requested that the Commission permit payment to the Committee of $12,500 by Standard and $12,500 plus $3,768.75 of actual expenses (R.) and $800 additional travel expense estimated to be incurred and $250 additional expense estimated for transcript of testimony, or a total expense of $4,818.75, and that it set forth in the opinion that such payments to the Committee may be divided as the Committee sees fit.

It may be noted in conclusion that the Committee having complied with the requirements of Rule U-62 sent a letter dated August 5, 1947 to all prior preference stockholders with enclosure of the find-

ings and opinion of the Commission with relation to solicitation dated July 3, 1947, together with a form of authorization and actually received authorization to represent holders of 36,537 such shares. In addition the Committee has been tendered such authorization for 10,000 additional shares, if desired, so it may be said to actually represent 46,537 shares of a total of 116,185 outstanding.

Re: William J. Cogan, Attorney for Van Kirk Committee:

At the time the Committee was formed in January, 1947, the immediate problem was how best to proceed, with any hope of success, in learning the true facts concerning the open account then asserted by Standard in a sum upwards of $1,000,000 to the end it could be minimized.

While suspicion of overcharge existed, the Committee was faced with the necessity of careful procedure. The problem may be described by a statement contained in U. S. v. Carter, 217 U. S. 286 (1910) as follows:

> "The corporate fiduciary ordinarily controls the formation of the record from which his fraud or unfairness may be proven, and may then be able to suppress the only evidence that would tend to demonstrate his fraud or unfairness."

With knowledge of the broad administrative powers of the Commission and the experience gained in participation in its operation and functioning, it was determined to petition the Com-

mission to investigate pursuant to appropriate provisions of the Public Utility Holding Company Act of 1935.

An exhaustive examination was made of reports to and proceedings had by the Commission and a variety of other records and reports which resulted in the petition filed by the Committee in March, 1947 and after the Commission consented to hear oral argument and did so, it made an order of investigation dated March 20, 1947 pursuant to Section 11 (a), 18 (a) and 18 (b) of the Act for the purpose of examining the past and present relationships among Standard, Market Street, and certain associate and affiliate companies, including the origin and status of the open account. The order also stayed Market Street from making any payments to Standard for a stated period, to maintain the status quo.

While the Committee was engaged in investigation, to learn sufficient facts to warrant the Commission to take jurisdiction, Standard chose to start an action on January 20, 1947, in the United States District Court, Northern District of California, Southern Division, against Market Street Railway Company, on the open account which was defended by Market Street only to the extent of 2% interest on a principal amount from 1939-1947.

It was necessary to consider whether to submit to that jurisdiction or to seek the jurisdiction of the Commission and it was concluded that chances to cause the production of facts, occurrences and records 10 to 20 years past through the facilities avail-

able in the District Court, were meagre, indeed, while favorable action on the Committee petition would tend to equalize the strong weight of a large holding company and that of small stockholders of a non-utility subsidiary.

It proved to be a fortunate choice.

The record as developed before the Commission was equivalent to trying a hard fought case in any court, marked by a motion to the Commission challenging its jurisdictin, an appeal therefrom to the Circuit Court of Appeals, Third Circuit, an attempt to have the matter heard in San Francisco, a motion by Public Utility Engineering and Service Corporation to quash a subpoena, studied and careful preparation of all subpoenaes, examination and use of 200 exhibits, many of which were voluminous; use of timing and judgment in the selection of witnesses to be subpoenaed and, of course, preparation for and examination of witnesses.

The result was to cause Standard concern shortly after the Commission took jurisdiction and as proof was developed on the record to cause it to seek an adjustment with the Van Kirk Committee, from time to time.

In the course of the preparation for, and participation in the proceeding before the Commission, no time record was kept, but the initial effort of counsel started as far back as April, 1946, became gradually more intensified and from January to September, 1947 may be said to have required full time and effort while since then, although likewise continu-

ous, only part time was required. After the settlement was arranged between Standard and the Van Kirk Committee, which by its terms required the authorization of the Commission and the District Court, Milton Paulson had Mr. Dreyfuss make a motion in said court to refer the matter to a Special Master to consider the fairness and adequacy of the settlement. This made it necessary for counsel for the Van Kirk Committee to attend in San Francisco and oppose such motion and to support a motion to the Court to authorize the completion of the settlement, all of which required a month's time. The matter was referred back to the Commission.

The sequence of negotiations shows that even before any action was instituted an attempt to reach a settlement was made by Russell Van Kirk. It shows that within a month after the Commission took jurisdiction, an offer was made by Standard to the Committee to reduce the claim of Standard $300,000 and to pay the attorney's fee, which was refused. That Standard offered to accept $650,000 and pay attorney and Committee fees which was refused. It shows finally a request for and acceptance of the proposed settlement which was stated on the record of December 9, 1947, now part of the plan.

The initiation and participation in the proceeding before the Commission was entirely responsible, first, for the development of proof of excessive charges for management, complete except for testimony of Bernard Brahenny, formerly Chief Auditor of Standard and except, of course, for the defense testimony which Standard contemplated.

Second, for the desire of Standard to settle the case; third, for the actual settlement as arranged, which resulted in a saving of $580,000 for Market Street Railway Company.

The legal fee of $50,000 represents less than 10% of the amount saved and the part for which Market Street would be liable upon authorization of the plan would be less than 5%, while a combination of legal fee, Committee fee and expenses for which Market Street is liable under the terms of the plan, represents only 7% of the amount saved.

Local custom in New York on contingent cases would average 20%.

Re: Milton Paulson:

As a preface to the following analysis of the services rendered by Milton Paulson and his associates and their alleged contribution to the $580,000 saved by Market Street Railway Company, it seems desirable to set forth that neither the Van Kirk Committee nor their counsel have or could have any objection to payment of any sum by Standard Gas and Electric Company to Milton Paulson and for his associates by way of negotiation, or order by the Commission or the Court.

The position taken by the Van Kirk Committee and their counsel, which prompts such analysis, is that they are solely responsible for the amount saved by Market Street Railway Company and owe a duty to the holders of 36,537 shares of prior preference stock as regards assets of Market Street Railway Company, and also are entitled to the fees

provided by the plan as fair and reasonable compensation for the services rendered, without diminution in any manner.

Milton Paulson testified on July 14, 1948, and examined witnesses on July 13 and 14, 1948, in support of his contention that he considers the sum of $75,000 as fair and reasonable compensation for his services and that of his associate attorney, Mr. Dreyfuss, his forwarding attorney, Irving Freidman, and his accountant investigator, David Berdon and Company (R. 880).

He claims no contribution by Irving Freidman and merely stated that Lea Rosen is a client of Freidman referred to Paulson and that Irving Freidman will receive 25 or 30% of any fee of Milton Paulson. (R. 919-920.)

An Exhibit number is reserved for a statement of services by Mr. Dreyfuss, but the tangible total would appear to be represented by the intervention in the District Court action and filing an answer of questionable legal merit, the material of which was adapted from the Van Kirk Committtee petitions to the Commission. His purported negotiations with Moore, Standard attorney, mean nothing since Moore was never authorized to negotiate. (R. 783.) His two trips to New York (R. 922) were for conferences with Milton Paulson. He is to receive one-half of any allowance made to Milton Paulson, presumably after other percentages which were testified as a charge against any such fee are paid.

An exhibit number is also reserved for a statement of services rendered to Milton Paulson by David Berdon and Company. Whatever this might set forth, it appears from the testimony of Milton Paulson (R. 942) that the main bulk of their work was the preparation of the preliminary investigating report which is Paulson Exhibit 7—made to him between May 29, 1947, and June 5, 1947, (R. 941). This report refers to the petition of the Van Kirk Committee to S. E. C. (R. 940), and was the only written report. (R. 941.)

Since the California action is merely at issue and no testimony has been taken in that case, no contribution has been made through that medium.

With knowledge of the Commission order of May 20, 1947, directing an investigation of the relationship, past and present, existing between Standard and Market Street and other companies, and with knowledge of the stay to maintain the status quo (R. 934), the intervention sought and achieved by Milton Paulson in the District Court action was a useless gesture, insofar as benefit to Market Street was concerned.

The claimed status of Milton Paulson infers and assumes he is aware of the decisions of Dederick vs. North American Company, 48 F. Supp. 410 (S.D.N.Y. 1943); Illinois-Iowa Power Co. vs. North American Light, Power Co., 49 F. Supp. 277 (D. Del 1943), and others where courts have stayed their own proceedings pending completion of administrative proceeding and is, likewise, aware of cases where inter-company claims which had been

the subject of litigation in the courts were disposed of in Section 11(e) plans.

Concerning the proceedings before the Commission, although Milton Paulson intervened on behalf of Lea Rosen, owner of 300 shares of prior preference stock, he merely attended the hearings. He testified on July 14, 1948, that it is essentially correct to say that he did not contribute in the development of any of the facts which were presented before the Securities and Exchange Commission. (R. 942.)

Since the claim is made that by far the greater part of his service lies in the so-called initiation, continuance of and responsibility for the settlement arranged between Standard Gas and Electric Company and the Van Kirk Committee (R. 924) and such claim vitally affects part of the service actually rendered by the Van Kirk Committee, analysis is made of the basis thereof.

In the first place, Milton Paulson did not initiate settlement negotiations.

These were initiated by Russell Van Kirk in December, 1946, before any action of any kind was under way.

The conference between Russell Van Kirk and Leo Crowley whereat an offer was made in April, 1947, by Mr. Crowley (R. 960-961), likewise, antedated any attempt by Milton Paulson to negotiate.

To properly understand the actual motivating force causing Milton Paulson to initiate his own attempts to be a factor in any settlement which might be effected, it is necessary to refer, first, to

the fact that Milton Paulson, as attorney for Lea Rosen, owner of 300 shares of prior preference stock of Market Street, was allowed to intervene on June 9, 1947, by the Commission and that he attended, but took no active part in the hearings before the Commission. Second, to the situation as developed on the record before the Commission on August 29, 1947, (the date he testified he wrote to Dreyfuss to initiate them). A variety of material had been subpoenaed from Market Street and Samuel Kahn, its President, had likewise been served. Included was all correspondence between Market Street and/or Samuel Kahn and Standard Gas and Electric Company and/or any of its officers from 1925 to 1935. Analysis of this correspondence and presentation thereof and examination thereon by counsel for the Van Kirk Committee on August 28 and 29, 1947, proved that Standard Gas and Electric Company was vulnerable. Third, the fact that the Van Kirk Committee, on advice of counsel, chose the Commission as the only forum which could secure a stockholders list, or which could develop facts through its extensive powers and status to provide a defense to the open account asserted by Standard; fourth, that to intervene in the action started by Standard in San Francisco would have committed the Van Kirk Committee to the jurisdiction of the Court to the virtual exclusion of the coordinate jurisdiction of the Commission which was sought. Fifth, the fact that the intervention by Lea Rosen with her 300 shares in the Federal Court provided her with a leverage whereby she purported to represent all

prior preference stockholders of Market Street in the Federal Court, although at the same time, her attorney, Milton Paulson, represented her before the Commission and knew from the facts developed on the record, that the Van Kirk Committee was authorized to represent upwards of 30,000 shares of said stock, both before the Commission and the same Federal Court.

The motive which prompted Milton Paulson to initiate his own attempts at settlement in San Francisco when he was already in the presence of Standard Gas and Electric attorneys and officers would appear to be his record status in the District Court, as indicated in the fifth consideration above set forth.

With respect to his continuance of attempts to effect a settlement on or about September 23, 1947, it may be noted that when Standard representatives made an offer to the Van Kirk Committee, it was rejected and they were told the Committee thought the entire open account should be eliminated.

It may well be that in the absence of such volunteer efforts by Milton Paulson to get a 50/50 settlement, the production of further testimony, without intermediate negotiations, would have caused Standard much greater concern and stimulated an even better offer than was finally accepted.

The Van Kirk Committee, as representative of upwards of 30,000 shares of prior preference shares, should have been left alone to negotiate at such time as they saw fit and they took the position that they did not choose to do so in combination with Milton Paulson.

The record shows the natural disposition by Standard representatives to settle at the best figure and to negotiate with Milton Paulson to the extent of considering presenting "a proposal of settlement for approval to the California Court—the District Court in California—and to the Commission, quite regardless of whether Mr. Cogan came along or not, although they much preferred that he should." (R. 901.)

It is contended that such continuance of conversations by Milton Paulson served no useful purpose, but was actually, or potentially, harmful.

It may be concluded from the foregoing that Milton Paulson did not initiate settlement negotiations, that the intermediate negotiations he had were a detriment rather than a help, that he did not participate in the final negotiations and that the saving of $580,000 by Market Street Railway Company is attributable only to the Van Kirk Committee and its counsel.

The folowing statements and positions of Milton Paulson seem irreconcilable:

In September, 1947, he thought the matter should be settled on a 50/50 basis, i.e., Standard to receive $550,000. (R.894.)

In October, 1947, he would not be willing to urge the Commission to accept any figure below 50/50. (R. 902.)

In December, 1947, he was not entirely satisfied with a settlement at the above figure, less $37,500 and thought he could do better. (R.640.)

In December, 1947, he made a motion in the Dis-

trict Court to refer the proposed settlement to a Special Master to consider whether it is fair and equitable and in the moving papers took no position for or against it.

When the motion was argued on March 15, 1948, a counter-motion was presented and argued to accept the settlement as made and he took a position against that.

In July, 1948, he took the position that he was primarily responsible and that in arranging the settlement William J. Cogan was creating the appearance that he (Cogan) was responsible. (R. 911.)

On July 21, 1948, he stated on the record his opinion that Standard should be compelled to pay all fees allowed and that if the settlement be approved in its present form no further allowances should be payable from Market Street funds.

Conclusion

The Van Kirk Committee and Its Counsel, William J. Cogan, Submit that the Plan of Market Street Railway Company Is Necessary To Effectuate the Provisions of Section 11 (b) and Is Fair and Reasonable With Respect To All Parties Concerned.

Respectfully submitted,

/s/ WILLIAM J. COGAN,
Attorney for Van Kirk Committee.

Received and filed August 11, 1948, U. S. Securities and Exchange Commission.

From: William J. Cogan

To: Securities and Exchange Commission

Subject: Re-Argument—Market Street Railway Company

Dated: New York, October 10, 1949

POINTS FOR PRESENTATION

1. Re Statement To Standard Representatives Involving Reference To Possible Retainer:

The occasion was a casual meeting between myself and four attorneys of Standard and a Vice President of Standard at the Barclay Hotel, Philadelphia, Pa., where the group enjoyed several cocktails and luncheon. I offered, on behalf of the Committee I represented, to recommend to Russell Van Kirk that Market Street Railway Company settle the open account if Standard would reduce it by the sum of $750,000, and pay a fee of $50,000 to me, and a fee of $25,000 to the Committee.

While lunching, and no doubt based upon my gratification at the manner in which the proof was developing, I made a statement to the effect that perhaps Standard would wish to retain me in other matters. It was accepted as a sort of a brag, and Mr. Reynolds, one of the attorneys of Standard, stated that if they hired any more attorneys, there would be more attorneys than employees of Standard. Nothing further was said.

The only conversation with reference to my offer of settlement was the contention by Mr. Sammond,

one of the attorneys, that Market Street Railway Company stockholders were guilty of laches, to which I responded that a Circuit Court decision held that testimony given before a Commission was not notice to stockholders. The group indicated that my offer of settlement was out of line.

Argument on this subject would include reference to the testimony of George Knourek, which entirely supports my position in the matter. It would also include the fact that had I wished to chance an adverse position to that of my stockholders, I could have associated myself with the attorney for a Stockholders' Committee of Louisville Gas & Electric Company, which was asserting claims against Standard Gas & Electric Company before the Commission at or about the same time, and could have provided evidence that Louisville was charged over $2,000,000 for management fees and over $900,000 for engineering fees, over a period of eleven years, and no doubt could have secured for myself a participation in the fees of such counsel.

The argument would also set forth that in the course of developing the proof against Standard Gas & Electric Co. in this matter, it became apparent that another cause of action existed in favor of Market Street Railway Company, which I intended to, and still intend to, assert at an appropriate time. This also would, in all likelihood, provide fees far in excess of anything Standard could conceivably pay.

Since the Van Kirk Committee was almost a

family group, living near the same community in which I reside, and having family connections extending back for forty years, this alone should preclude any failure of complete fiduciary service on my part to the Stockholders of Market Street.

In reference to fees for myself and the Committee, it is apparent that eliminating reference to "Retainer" from consideration, the proposed fees would serve to reduce the amount payable to Standard by Market Street, and would be of no moment on the allowance thereof, since they would necessarily be subject to approval by the Commission and by the District Court, and would serve merely as an estimate of the reasonable value of the services rendered.

2. Re Colloquy Quoted at Page 14, Commission Opinion:

The testimony, as quoted, was given on July 14th, 1948, seven months after an agreement of settlement was reached. I request that it be considered in the light of my conviction that over a period of six months preceding the agreed settlement, Milton Paulson had bent every effort to become an important factor before the Commission as regards negotiations for settlement, and had continuously held the proceeding pending before the District Court in California over the head of the Committee and its counsel, that he was interfering with what we considered the proper procedure on negotiating in that he started his negotiations at the figure he hoped Standard would pay, while the Committee

started its negotiations at the full amount, with the result that they naturally were interested in his negotiations rather than ours. This built up a resentment on my part, which I felt was fully justified, and which caused me to give testimony which has proven harmful to myself.

On that occasion, I was tired by the time Paulson cross-examined, and I felt that the testimony of George Knourek would be sufficient proof that no intent to violate my duty could be inferred. Accordingly, and as I admit without true justification, and because I have a tendency to be literal, I answered with a definition of "retainer" and caused the resulting furor.

3. Evidences of Good Faith at All Times on the Part of William J. Cogan Toward Market Street Railway Company and Its Prior Preference Stockholders.

The Commission is awaer that efforts by Russell Van Kirk personally to secure action on the part of the Commission were of no avail, and that the Commission agreed to proceed only after oral argument. The result fully justifies such efforts.

At the opening hearing, when Milton Paulson secured intervention on behalf of Lea Rosen, owner of 300 shares of stock, Russell Van Kirk told me that he had a representative suit under way out West, in which he was represented by an attorney named Pomerantz, and that Milton Paulson shared offices with Pomerantz. He told me that he had informed Pomerantz of the fact that I was hired to

make an application to the Commission, and had secured an order of investigation in connection with questioning an open account asserted by Standard Gas & Electric Company against Market Street Railway Company. He told me that after he had finished giving Pomerantz such information, that Milton Paulson put on his hat and rushed out of the office, and when he appeared with a client in the Market Street Railway matter, Pomerantz told him he would have to leave the office of Pomerantz and find an office elsewhere. Russell Van Kirk also suggested that thereafter we pay no attention to Paulson.

I recite the foregoing with knowledge that Russell Van Kirk, being deceased, it would be difficult, if not impossible, to prove, but it represents the actual reasons why Russell Van Kirk during his lifetime was desirous that I proceed in the matter without co-operation with Paulson.

The record shows that on August 29th, 1947, after I had developed proof from Samuel Kahn, President of Market Street, showing liability on the part of Standard, Paulson caused his California associate, to start settlement negotiations, although, as it later developed, the California counsel for Standard had no authority to negotiate.

The result of Paulson's activity in this regard was an inquiry of Russell Van Kirk and myself as to what firm offer Standard was willing to make, which proved to be $650,000, and which was rejected by Russell Van Kirk, who stated to counsel for Standard that we wanted the whole account wiped

out. This was in contrast to Paulson's suggestion that the matter be settled by allowing Market Street a reduction of $500,000, and provides a reason why Standard would continue to be interested in Paulson's negotiations.

In October, 1947, as indicated by the Commission opinion, the Committee and Standard were $300,000 apart, in their estimate of a proper settlement.

The record shows a letter which Paulson wrote the Staff concerning an offer of settlement of $650,000, which Standard was willing to accept, and although it does not appear in the record, I had a conference with the Staff on the Friday preceding October 20th, 1947. A letter dated October 20th, 1947, to Russell Van Kirk which also is not placed in the record, states the following:

> "I explained in detail the initial conference you had with Mr. Leo Crowley, and our later conference with Messrs. Hanson, Knourek and Reynolds, whereat the offer of $650,000 was made, which Paulson seems to have heard about—I told them we did not preclude further conferences but seemed too far apart to cause us to renew negotiations."

I also stated in the letter my private opinion that we should accept settlement by reduction of $750,000.00 from the claim.

The figure thus given Russell Van Kirk approximated the figure stated at the Barclay Hotel, except that I then also suggested payments of $75,000 fees.

I gained the impression during my conference on

Friday preceding October 20th, 1947, with the Staff that they would like to see the matter settled, although no definite statement to that effect was made.

Shortly after October 20th, 1947, I was informed that Russell Van Kirk had an illness which was incurable and was expected to die within six weeks. I visited him at his house shortly thereafter and discussed the case, and he then expressed the hope that he would shortly be back to business.

At about this time, (actually November 13th, 1947) George Knourek telephoned me and asked if I would join a general conference with the Staff, which presumably would include Paulson, and I agreed to do so, but no such conference was held.

On November 5th, 1947, Messrs. Knourek and Reynolds called at my office and asked if the Committee was willing to make a settlement by payment to Standard of $650,000 provided Standard would pay half of the $50,000 fee to me and half of the $25,000 fee to the Committee. I sad, "No, but if they would take $100,000 less and pay those fees, Russell Van Kirk might accept the offer." They asked me to submit both figures, which I did, and Russell Van Kirk accepted the offer, which was the one now offered. Mr. Knourek requested that I make the offer to settle in writing for consideration by his Board, which I did, with a three-day deadline. On November 10th, 1947, I formally withdrew the offer. On December 5th, 1947, I was requested to renew the offer in writing, which I did, and it was announced on the record December 9th, 1947.

The reasons which actuated me in recommending

to Russell Van Kirk that he accept the settlement were the fact that Standard had hired Samuel Hart, Engineer, to build up a schedule of the cost of service, the exact amount of which would, of course, be purely speculative but might amount to a figure equal to the concession represented by the settlement. The second reason was that the Staff, as aforesaid, gave the impression they would like to see a settlement. The third reason was that in the event we proceeded to develop all the proof on the record, we might run into extended and expensive litigation, with a minimum of expense money being available to me after the death of Russell Van Kirk. And the final reason was that I had concluded a good cause of action existed in favor of Market Street Railway Company, which I would assert at an appropriate time, and which would result in Market Street Railway Company actually finishing up by saving a figure approximately equal to the full amount of the open account, which was asserted by Standard Gas & Electric Company.

During the period from October 20th, 1947, when I had the conference with the attorneys, and Vice President of Standard, up to December 9th, 1947, and including that date, I made every effort to develop further proof in the matter including a subpoena served on Bernard Braheney, who had been chief accountant for Standard from 1925 to 1936, and who had been a vice president during part of that time, also subpoena on H. C. Cummins, who had been an officer of Standard for many years, also upon an officer of Standard Power and Light

Corporation, and also upon the attorney for Ladenburg, Thalman.

The Commission, upon request of Messrs. Braheney and Cummins, postponed their required appearance on two occasions, and whether correctly or not, I felt that perhaps the Commission itself would like to see the matter disposed of.

* * *

The Commission has required me to set forth reasons why the material hereinabove set forth was not presented before it had the matter for decision.

Concerning the material set forth above, as Points 1 and 2, it is my contention that the record as a whole shows conclusively that at all times the prior preference stockholders received the best legal service I was able to provide; and that apart from the boastful remarks now complained of, no possible finger of suspicion could point to me. I also felt that the testimony of George Knourek completely disposed of any inference of wrongdoing; and I felt sure that in having explained the occurrence during oral argument, the Commission would not give any weight to any inferential moral issue resulting from an unexpressed thought. I felt also that it would serve no useful purpose to explain during the oral argument the fact that the testimony given on cross-examination was, in a measure, expression of resentment, toward Mr. Paulson and his tactics.

Concerning Point 3, I would have preferred to avoid reference to what Russell Van Kirk told me

concerning Milton Paulson, and until my good faith was attacked because I did not co-operate with him, I made no effort to disclose such reason. While other material in this Point is actually a repetition of matters already presented for consideration by the Commission, I repeat them because they become important in the sequence of my efforts.

The letter to Russell Van Kirk or the information contained therein was not heretofore offered, because there was no necessity of supporting my testimony concerning the offer of settlement made the attorneys for Standard and its Vice President on October 22nd, 1947.

The conference with the Staff was not part of the record, because the trial examiner ruled that testimony concerning such conferences was not admissible under a decision in the case Okin vs. American & Foreign Power and I felt there was no necessity of proving that I had such a conference.

The telephone request made by George Knourek on November 13th, 1947, that I have a general conference with the Staff on the question of settlement seemed of no importance until the sequence of settlement negotiations became of seeming importance to the Commission; and it, of course, supports my statement of good faith.

With reference to other witnesses who were being examined up to and including the date settlement was announced, this material is now included be-

cause it negates any willingness on my part to in any manner fail the stockholders.

* * *

My sole purpose in prescribing fees for attorneys and Committee in settlement negotiations was to have part thereof paid by Standard, since the reasonableness was a question for the Court and Commission. If I sought an allowance commensurate with one granted by Judge Knox, I would have asked for $150,000.

/s/ WILLIAM J. COGAN.

Received October 11, 1949, U. S. Securities and Exchange Commission.

Before the Securities and Exchange Commission

At a regular session of the Securities and Exchange Commission held at its office in the City of Washington, D. C., on the 18th day of April, 1950.

[Title of Cause.]

ORDER NUNC PRO TUNC EXTENDING TIME FOR FILING AMENDMENT TO SECTION 11(e) PLAN

The Commission by its Supplemental Findings and Opinion herein, dated March 9, 1950, having found that the Amended Plan under Section 11 (e) of the Public Utility Holding Company Act of 1935, for Market Street Railway Company ("Market

Street"), a non-utility subsidiary of Standard Gas and Electric Company, a registered holding company, could be approved if further amended within fifteen days in certain respects specified in said Supplemental Findings and Opinion, and having stated that unless the plan be so amended within such time, the Commission shall take such action as may be appropriate; and

Market Street having on March 23, 1950, requested a twenty-day extension of the time within which to file such further amendment to its Amended Plan; and

The Commission by Minute dated March 24, 1950 having granted the said request for a twenty-day extension of the time of Market Street to file such further amendment; and

The Board of Directors of Market Street having adopted a resolution on March 30, 1950 resolving:

> "That unless it should hereafter appear to the satisfaction of this Board that other or different action should be taken in respect thereto" * * * "the amendment to the Amended Plan for Liquidation and Dissolution of Market Street Railway Company proposed in the Supplemental Findings and Opinion of the Securities and Exchange Commission dated March 9, 1950 is not approved"; and

Graham-Newman Corporation, a holder of 10,000 shares of Prior Preference 6% Cumulative Stock, par value $100 per sshare, of Market Street, having on the 14th day of April, 1950, requested the Com-

mission to enter an order extending nunc pro tunc the time within which Market Street may file an appropriate amendment to its Amended Plan from April 13, 1950 to May 15, 1950, so as to permit the reconsideration by the Board of Directors of Market Street, after the annual meeting of said company scheduled to be held April 26, 1950, of the action heretofore taken; and

The Commission deeming it appropriate under the circumstances that a further extension of time should be granted nunc pro tunc from April 13, 1950 to May 15, 1950:

It Is Ordered nunc pro tunc that Market Street be, and hereby is, granted an additional period from April 13, 1950 to May 15, 1950 within which to file an appropriate amendment to the Amended Plan for Liquidation and Dissolution of Market Street Railway Company in the respects specified in the Supplemental Findings and Opinion of the Commission, dated March 9, 1950.

By the Commission.

[Seal] ORVAL L. DuBOIS,
Secretary.

By NELLYE A. THORSEN,
Assistant Secretary.

Stockholders' Protective Committee

Prior Preference-6%Cumulative Capital Stock of the Market Street Railway Company of San Francisco

37 Wall Street-New York 5, N. Y.
Room 2508

RUSSELL M. VanKIRK,
Chairman.

EDMUND T. WILLETTS,
Treasurer.

JOHN H. VanKIRK,
Secretary.

WILLIAM J. COGAN,
Counsel.

April 28, 1950

Securities & Exchange Commission
425 Second Street, N. W.
Washington 25, D. C.

Re: Market Street Railway. File No. 54-169, 4-63, 68-84

Gentlemen:

The above Committee wishes to reaffirm its complete approval of the Plan, as amended. We feel that it is in the best interest of all the Prior Preferred Stockholders to have an early consummation of the present Plan; so that the company may proceed without delay with its liquidation.

The Committee was not informed that an injunc-

tion was being requested against Market Street's filing the amended Plan, nor were we consulted in any manner prior to Mr. Cogan's filing the complaint against Standard Power & Light Corporation.

The Committee will not countenance the use of its name without prior approval. We are therefore notifying Mr. Cogan that he is no longer authorized to act as counsel for the Committee and that the Committee wishes to withdraw its name from any and all legal actions brought in our name, with the exception of the Plan now before you for consideration. We hope this letter will correct any misunderstanding regarding the Committee's feelings. The Committee was organized to protect the interest of the Prior Preferred Stockholders and we firmly believe that their interest will be best protected by the speedy and successful completion of the plan.

Very truly yours,

JOHN H. VanKIRK,
Secretary.

Approved:

/s/ BLOOMFIELD HULICK.

/s/ EDMUND T. WILLETTS,

JVK/J

Received: May 2, 1950, Securities and Exchange Commission.

In the District Court of the United States for the Northern District of California

No. 29723

In the Matter of
MARKET STREET RAILWAY COMPANY

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the parties, to wit:

Complaint and Exhibits A, B, C, D, E, F, G, H, I, J, K, L, and M.

Order for Hearing, etc.; for Determination of Amended Plan of Liquidation, etc., and Exhibit 1—Notice.

Notice of Appearance of William J. Cogan.

Notice of Appearance of Charles T. Jones.

Affidavit of Charles T. Jones.

Order Remanding Matter to Securities and Exchange Commission, etc.

Notice of Appeal by Securities and Exchange Commission.

Notice of Appeal by William J. Cogan.

Appellant's Designation of Record on Appeal.

Appellant's Statement of Points.

Stipulation and Order—Extending Time.

Notice of Appeal by Charles T. Jones.

Order—Extending Time.

Appellee's Designation of Record on Appeal.

Appellees' and Cross-Appellants' Statement of Points.

Reporter's Transcripts:

Vol. 1. Partial Transcript for July 6, 1950—Pages 1-83-A.

Vol. 2. Partial Transcript for July 6, 1950—Pages 84-126-A.

Vol. 3. Transcript for July 7, 1950—Pages 127-242-A.

Vol. 4. Partial Transcript for July 7, 1950—Pages 243-258.

Two Volumes of the Official Report of Proceedings before the Securities and Exchange Commission — Original and Duplicate, both marked 54-169-1-2.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 18th day of October, A.D. 1950.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO SUPPLEMENT TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals filed in this Court, in the above-entitled case, and in allied cases, and that they constitute the Supplement to the Record on Appeal herein, as designated by the Appellant, to wit:

Supplemental Designation of Record on Appeal by Securities and Exchange Commission.

Order, dated May 2, 1950, and filed May 3, 1950, in Case No. 29699, Charles T. Jones, Plaintiff, vs. Market Street Railway Company, Defendant.

Affidavit in Support of Motion for Order Authorizing Settlement by William J. Cogan, filed March 11, 1948, in Case No. 26807-R, Standard Gas and Electric Company, Plaintiff, vs. Market Street Railway Company, Defendant; Lea Rosen, etc., Defendant-Intervenor. (Attached is an Affidavit in Support of Application for Leave to Intervene by John H. Van Kirk.)

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at

San Francisco, California, this 1st day of December, 1950.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12716. United States Court of Appeals for the Ninth Circuit. Securities and Exchange Commission, Appellant, vs. William J. Cogan, Appellee; William J. Cogan, Appellant, vs. Securities and Exchange Commission, Market Street Railway Company, Standard Gas and Electric Company and Standard Power and Light Corporation, Appellees; Charles T. Jones, Appellant, vs. Securities and Exchange Commission, Market Street Railway Company, Standard Gas and Electric Company and Standard Power and Light Corporation, Appellees. Transcript of Record. Appeals from the United States District Court for the Northern District of California, Southern Division.

Filed October 18, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

(Copy)

Western Union

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Samuel Kahn, President
Market Street Railway Co.
58 Sutter St. SFRAN

Securities and Exchange Commission Opinion March Ninth Seeks Your Further Assistance to Release Standard Power and Light Company Liability Stop Appel Testified That Hansen of Standard Gas Requested the Inclusion of Release of Subsidiaries as a Provision of the Amended Plan Which Showed a Suit in New Jersey Against Standard Power Stop Hulick Testified in the New Jersey Action That the Stock Holders Committee Did Not Authorize the Van Kirk Letter Stating That the Committee Favored the Amended Plan Stop I Strongly Urge and Advise You Not to File Further Amendment as Being Contrary to the Interests of Market Street Railway Company and Yourself.

WILLIAM J. COGAN,
Counsel for Prior Preference Stockholders Committee.

[Endorsed]: Filed February 8, 1951, U.S.C.A.

United States Court of Appeals
for the Ninth Circuit

No. 12,716

SECURITIES AND EXCHANGE COMMISSION,

Appellant,

vs.

WILLIAM J. COGAN,

Appellee,

WILLIAM J. COGAN and CHARLES T. JONES,

Appellants,

vs.

SECURITIES AND EXCHANGE COMMISSION,

Appellee.

STIPULATION AND ORDER

Whereas, the above-entitled Court, upon motion of Appellee and Cross-Appellant William J. Cogan did, on the 20th day of December, 1950, make its Order on Motion to Prosecute Appeal on Typewritten Transcript, providing in part as follows:

> "* * * It Is Further Ordered that appellant Cogan shall file within five days from date his statement of points relied upon, and his designation of the portions of record deemed material to support such points.
>
> "It Is Further Ordered that the cause shall be heard upon the typewritten transcript of

record and the original exhibits without the necessity of printing, provided that the appellant shall furnish to the court within thirty days from date, an original and three typed copies of the portions of the record he deems material for the consideration of his points on appeal, prepared in accordance with Rule 11, subdivision 3, serving a copy thereof upon opposing counsel."

Whereas, said William J. Cogan, pursuant to said Order has designated approximately 800 pages of transcript of record to be typed; and

Whereas, Appellant and Cross-Appellee, Securities and Exchange Commission, has designated some 117 pages of the typewritten record to be printed, which said pages are not included among those specified by said William J. Cogan; and

Whereas, the typewritten transcript being prepared at the direction of said William J. Cogan and the printed record to be prepared at the direction of Securities and Exchange Commission will result in the presentation to the Court of a fragmentary and non-continuous record of proceedings; partly in printed and partly in typewritten form; and

Whereas, the parties hereto deem it advisable and appropriate, for the convenience of the Court and Counsel, that the appeals in this matter be heard on a single, integrated transcript of record; Now Therefore

It Is Hereby Stipulated by and between Counsel

for the respective parties hereto, Subject to the Approval of the Court, that that portion of the transcript of record designated as being deemed material by Securities and Exchange Commission may be submitted to the Court in typewritten form; and that the transcript so designated may be combined with that portion of the transcript designated by Cogan in a single integrated document arranged in proper sequence, and copies thereof served and filed as provided in the order of this Court dated December 20, 1950, hereinabove referred to; Securities and Exchange Commission to bear the cost of typing that portion of the transcript designated by it.

Dated: January 17, 1951.

WILLIAM J. COGAN,
M. MITCHELL BOURQUIN,
By /s/ M. MITCHELL BOURQUIN,
Attorneys for Appellants, William J. Cogan and Charles T. Jones, and Appellee, William J. Cogan.

ROGER S. FOSTER,
General Counsel,
MYRON S. ISAACS,
General Counsel,
Division of Public Utilities,
ARTHUR E. PENNEKAMP,
By /s/ ARTHUR E. PENNEKAMP,
Attorneys for Appellant and Cross-Appellee, Securities and Exchange Commission.

It Is So Ordered:

/s/ WILLIAM HEALY,

/s/ H. T. BONE,

/s/ WM. E. ORR,

Justices of the Court of Appeals.

Received January 18, 1951, U. S. Securities and Exchange Commission.

[Endorsed]: Filed January 22, 1951.

At a Stated Term, to wit: The October Term, 1950, of the United States Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Wednesday, the twentieth day of December, in the year of our Lord one thousand nine hundred and fifty.

Present: Honorable William Healy, Circuit Judge, Presiding,
Honorable Homer T. Bone, Circuit Judge,
Honorable William E. Orr, Circuit Judge.

[Title of Cause.]

ORDER ON MOTION TO PROSECUTE APPEAL ON TYPEWRITTEN TRANSCRIPT

Ordered motion of appellant Cogan for leave to prosecute appeal herein upon tyepwritten transcript of record presented by Mr. Franklin Dill, counsel

for said appellant, and Mr. Arthur E. Pennekamp, Attorney, Securities and Exchange Commission, having been heard, submitted to the court for consideration and decision.

Upon consideration thereof, It Is Further Ordered that appellant Cogan shall file within five days from date his statement of points relied upon, and his designation of the portions of record deemed material to support such points.

It Is Further Ordered that the cause shall be heard upon the typewritten transcript of record and the original exhibits without the necessity of printing, provided that the appellant shall furnish to the court within thirty days from date, an original and three typed copies of the portions of the record he deems material for the consideration of his points on appeal, prepared in accordance with Rule 11, subdivision 2, serving a copy thereof upon opposing counsel.

It Is Further Ordered that the appellant may add as a printed appendix to his brief such portions of the exhibits which he deems material.

No. 12716
No. 12813

In the United States Court of Appeals for the Ninth Circuit

SECURITIES AND EXCHANGE COMMISSION, APPELLANT

vs.

WILLIAM J. COGAN, APPELLEE

WILLIAM J. COGAN, APPELLANT

vs.

SECURITIES AND EXCHANGE COMMISSION, MARKET STREET RAILWAY COMPANY, ET AL., APPELLEES

CHARLES T. JONES, APPELLANT

vs.

SECURITIES AND EXCHANGE COMMISSION, MARKET STREET RAILWAY COMPANY, ET AL., APPELLEES

WILLIAM J. COGAN AND CHARLES T. JONES, APPELLANTS

vs.

SECURITIES AND EXCHANGE COMMISSION, MARKET STREET RAILWAY COMPANY, ET AL., APPELLEES

OPENING BRIEF FOR SECURITIES AND EXCHANGE COMMISSION

ROGER S. FOSTER,
General Counsel,

MYRON S. ISAACS,
Chief Counsel, Division of Public Utilities,

W. VICTOR RODIN,
Attorney,

Securities and Exchange Commission,
425 Second Street NW.,
Washington 25, D. C.

ED
1951
O'BRIEN,

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In the United States Court of Appeals for the Ninth Circuit

No. 12716
No. 12813

Securities and Exchange Commission, appellant

vs.

William J. Cogan, appellee

William J. Cogan, appellant

vs.

Securities and Exchange Commission, Market Street Railway Company, Standard Gas and Electric Company and Standard Power and Light Corporation, appellees

---

Charles T. Jones, appellant

vs.

Securities and Exchange Commission, Market Street Railway Company, Standard Gas and Electric Company and Standard Power and Light Corporation, appellees

---

William J. Cogan and Charles T. Jones, appellants

vs.

Securities and Exchange Commission, Market Street Railway Company, Standard Gas and Electric Company and Standard Power and Light Corporation, appellees

OPENING BRIEF FOR SECURITIES AND EXCHANGE COMMISSION

STATEMENT OF JURISDICTION

These are consolidated appeals from orders of the United States District Court for the Northern District of California, Southern Division, dated July 11, 1950 (P. R. 108–13),[1] and November 21, 1950 (R. 2–11), respectively, both entered pursuant to Section 11 (e) of the Public Utility Holding Company Act of 1935 (15 U. S. C. 79a *et seq.*) ("Act"). The order of July 11, 1950, approved the principal provisions of a plan for the reorganization of Market Street Railway Company ("Market Street"), previously approved by the Commission, but disapproved the plan insofar as it failed to provide an allowance of fees for William J. Cogan as attorney for the Van Kirk Committee for prior preference stockholders of Market Street, and remanded the proceeding to the Commission. The Commission appealed from those portions of the order which disapproved the Commission's determination with respect to the Cogan fee (Appeal No. 12,716). William J. Cogan and Charles T. Jones, a prior preference stockholder of Market Street, appealed from the remaining provisions of the order of July 11, 1950, which approved the plan in substantially all other respects (Appeal No. 12,716). Cogan and Jones also appealed (No. 12,813) from the order of November 21, 1950, which both approved and directed enforcement of Step One of an

[1] "P. R." refers to the printed portion and "T. R." to the typewritten portion of the record in No. 12,716. "R." refers to the record in No. 12,813.

amended plan, consisting of those provisions of the earlier plan which had been approved by the district court in its order of July 11, 1950, and which as a result of an amendment, approved by the Commission after remand, were severed from the provisions with respect to fees and are to be carried out independently of these provisions. Step Two of the amended plan relates primarily to the allowance of fees and requires further action by the Commission depending upon the ultimate disposition of the issues raised by its appeal from the order of July 11, 1950. Step One has since been consummated.

The district court has jurisdiction of the matter under Sections 11 (e), 18 (f), and 25 of the Act.

The jurisdiction of this Court is invoked under 28 U. S. C. 1291, made applicable by Section 25 of the Holding Company Act.[2]

STATEMENT OF THE CASE

Market Street, a California corporation, is an inactive subsidiary of Standard Gas and Electric Com-

---

[2] The district court's order of July 11, 1950, while final in its refusal to approve the provisions of the plan relating to Cogan's fee and in its remand thereof to the Commission appears to us to be interlocutory insofar as it indicated approval, without present enforcement, of the other provisions of the plan. Those portions of the order have been superseded by the order of November 21, 1950, which reapproved and enforced these aspects of the plan after severance from the issue with respect to fees. The point does not seem material, however, since the appeal of Cogan and Jones in No. 12,813 from the order of November 21, 1950, raises the same issues. With respect to the status of appellants, we concede Jones' standing to appeal. Since Cogan's only individual interest is in his fee, we question his standing as an appellant to raise issues which do not involve his fee.

pany ("Standard Gas"), a Delaware corporation and a registered holding company under the Act (P. R. 37). Standard Gas, in turn, is and since 1930 has been a subsidiary of Standard Power and Light Corporation ("Standard Power"), which is also a Delaware corporation registered as a holding company under the Act (P. R. 8–9).[3]

In 1941, Standard Gas was ordered by the Commission pursuant to Section 11 (b) (1) of the Act to dispose of its interests in Market Street (9 S. E. C. 862). At that time Market Street was engaged in the operation of a street railway system in and about the City of San Francisco (P. R. 39). In 1944, Market Street sold its operating properties to the City and County of San Francisco for the sum of $7,500,000, which has since been paid in full (P. R. 8, 15, 39). Since the sale of the railway properties, it has had no income-producing property except for its holdings of government securities (T. R. 203–4), while its expenses have exceeded its income (P. R. 9, 40). As of June 30, 1948, it had total assets of about $3,433,000 (P. R. 39), and as of June 30, 1950, its total assets amounted to about $3,000,000 (R. 96).

Prior to consummation of Step One of the plan, the capital structure of Market Street consisted of

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[3] Standard Gas was organized by H. M. Byllesby & Co., which thereafter, in 1924 and 1925, acquired voting control of Market Street. In 1925, Byllesby transferred its interest in Market Street to Standard Power, then a subsidiary of Standard Gas. In 1930, Standard Gas acquired directly the Market Street securities which it held until consummation of Step One of the amended plan. Standard Power now owns approximately 54% of Standard Gas' outstanding common stock, and approximately 9% of its outstanding prior preference stocks (P. R. 49; T. R. 434–35).

three series of preferred stocks and common stock, all of which were entitled to one vote per share. These stocks, in their order of preference, consisted of 116,185 shares of prior preference 6% cumulative stock, all publicly held; 49,868-½ shares of preferred 6% cumulative stock, of which Standard Gas owned 39,250 shares; 46,737 shares of second preferred 6% noncumulative stock, of which Standard Gas owned 25,500 shares; and 106,474 shares of common stock of which Standard Gas owned 61,900 shares. Standard Gas' holdings thus constituted about 40% of the voting securities of Market Street, while the prior preference stockholders had about 36% of the voting power (P. R. 9–10, 29, 42–43, 184). Under Market Street's charter, upon dissolution the prior preference stock was entitled to a minimum liquidation preference equal to its par value of $11,618,500 plus a further preference for dividend arrears, which totaled over $19,500,000 as of June 30, 1950, to the extent of any undistributed surplus profits. Since there was no expectation of earnings and its total assets were about $3,000,000 as of June 30, 1950, before provision for creditors' claims, the prior preference stockholders were indisputably entitled to receive all residual assets of Market Street (P. R. 32–33, 57).

As of June 30, 1948, creditors' claims against Market Street consisted of tort claims and workmen's compensation claims in the approximate amount of $525,000, and a disputed claim of Standard Gas (P. R. 41). This claim was based upon a book open account indebtedness. According to the books of

Market Street, as of June 30, 1948, it owed Standard Gas $990,832, representing $707,000 of principal plus accrued interest to that date. Standard Gas, however, as of that date claimed an additional $141,859 of interest for a total claim of $1,132,691 (P. R. 41–42).[4]

In May 1947, the Commission ordered public investigatory hearings pursuant to Sections 11 (a), 18 (a) and 18 (b) of the Act for the purpose of examining the past and present relationships among Standard Gas, Market Street, and certain associate and affiliate companies, and the facts and circumstances concerning charges for services made against Market Street by affiliated companies (H. C. A. Release No. 7425; P. R. 11).[5] This order recites that it is based

[4] The variance in the amount of the interest claim is due to the fact that Standard Gas was accruing interest at the rate of 6% on the open account, while Market Street pursuant to an order of the California Railroad Commission reduced the interest rate from 6% to 4% on October 24, 1939. Standard Gas was not a party to the action resulting in that order, and never considered itself bound by it (P. R. 9, 30, 42). In January 1947, Standard Gas sued Market Street on the open account claiming an amount which reflected the higher interest claim (N. D. Cal., Civil Action No. 26807–R). Market Street filed an answer admitting liability on the basis of the lower interest rate. Lea Rosen, a holder of 300 shares of prior preference stock of Market Street, intervened through her attorneys, Milton Paulson and others, and filed an answer denying that Market Street was indebted to Standard Gas in any amount (P. R. 10–11). The action was not prosecuted pending completion of the Commission's proceedings on the plan (P. R. 14, 42).

[5] The Commission's Notice and Order also prohibited any payment by Market Street to Standard Gas on the open account until the expiration of 60 days following the hearing (later extended to 60 days following the closing of the record in the proceedings, H. C. A. Release No. 7664). Standard Gas filed a motion to dis-

upon petitions filed with the Commission by William J. Cogan, as attorney for Russell M. Van Kirk, Bloomfield Hulick and Edmund T. Willetts, acting as a committee ("Van Kirk Committee") for prior preference stockholders of Market Street (P. R. 120–45), and upon information in the Commission's files. The hearings indicated that Standard Gas' former subsidiary service company, Byllesby Engineering and Management Corporation ("Byllesby Engineering"),[6] which rendered management services on a contractual basis to Market Street from 1925 to 1935 for fees totalling $1,562,500 (P. R. 50–51), greatly overcharged Market Street for these services and therefore that Market Street had a cross-claim for the profits realized on these services by Standard Gas and its subsidiaries (P. R. 52–53). The amount of the overcharges was not definitely established. The Commission found that of the $675,000 in supervision fees paid by Market Street to Byllesby Engineering from 1926 through 1929, $270,000 was paid to Standard Power (P. R. 52–53), which during that period was also a subsidiary of Standard Gas (see note 3, *supra*).[7]

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miss the Committee's petitions and vacate the Commission's order, or, in the alternative, for a stay of the proceedings. The Commission denied the motion on August 1, 1947 (H. C. A. Release No. 7609). Standard Gas filed a petition to review the order and a motion to stay the Commission's investigatory proceedings, in the Court of Appeals for the Third Circuit (October Term, 1946, No. 9481). On August 6, 1947, a stay was denied, and on January 1, 1948, the appeal was dismissed by stipulation (P. R. 11–12).

[6] The name of this corporation was changed in 1935 to Public Utility Engineering and Service Corporation (P. R. 38).

[7] Cogan estimated the total claim of Market Street against Standard Gas at approximately $1,257,000, including interest.

During the course of the hearings, Cogan, as attorney for the Van Kirk Committee which represented approximately 36,500 shares of prior preference stock (P. R. 178), and another attorney, Milton Paulson, who represented an individual prior preference stockholder (see note 4, *supra*), independently discussed with Standard Gas settlement of the cross-claims between Market Street and Standard Gas (T. R. 140–45, 186). Standard Gas finally conducted negotiations solely with Cogan and reached a settlement with him in December 1947.

At the time Cogan began settlement negotiations with George W. Knourek, who was representing Standard Gas, Cogan was aware of the separate efforts on the part of Paulson to negotiate a settlement and also of an earlier settlement discussion between Leo Crowley, then chairman of Standard Gas' board of directors, and Van Kirk. According to Cogan, this earlier discussion was initiated by Crowley shortly after an order of May 20, 1947, of the United States Court of Appeals for the Third Circuit which denied a stay of the proceedings before the Commission, and Crowley's offer, which was not accepted, was to reduce the amount of the open account to $800,000. See Cogan affidavit of March 11, 1948 (P. R. 168, 175). In his subsequent testimony before the Commission Cogan described the offer as involving a reduction of $250,000 in Standard Gas' claim, which amounted to substantially the same thing, and as including a payment of $50,000

to Cogan for attorney's fees (T. R. 334–35).[8] Cogan's personal participation in settlement negotiations began with a discussion on September 23, 1947, at which Standard Gas made an offer which was not accepted, to settle for a payment of $650,000 by Market Street, according to Cogan (T. R. 337), and of $675,000, according to Knourek (T. R. 146). Cogan at that time demanded that Standard Gas should cancel the entire claim and give the Van Kirk Committee representation on the board of directors of Market Street (T. R. 146).

On October 22, 1947, at an accidental meeting with officers of Standard Gas at the Barclay Hotel in Philadelphia (T. R. 147, 178–79, 374), Cogan offered to agree to a reduction of $750,000 in the open account (T. R. 202, 337), which would have involved a payment by Market Street of approximately $350,000, "provided it [Standard Gas] paid me a counsel fee of $50,000 and paid the committee a fee of $25,000" (T. R. 375). At that meeting, and during the discussion of settlement, Cogan admittedly said: "In case you don't want me as counsel against you on any other matter, perhaps you could give me a retainer" (T. R. 376, 377).[9] Standard Gas did not

[8] Cogan's hearsay account of this discussion was admitted in evidence, and was noted in the Commission's opinion (P. R. 59). Van Kirk had died shortly after the settlement agreement (T. R. 351), and Crowley was not called as a witness.

[9] Cogan testified on cross-examination as follows (T. R. 376, 377):

Q. Didn't you ask for a retainer?

A. Not in connection with that settlement.

Q. Tell us what you asked for about a retainer.

accept the offer made by Cogan nor agree to pay Cogan a retainer (T. R. 147, 148), but from that time onward the amount of the fees to be paid Cogan and the Van Kirk Committee was not the subject of further negotiation.

On November 5, 1947, Standard Gas' representatives met with Cogan in his office in New York and offered to settle on the basis of a payment of $650,000 by Market Street to Standard Gas and payments of $50,000 to Cogan and $25,000 to the Committee, half of these fees to be paid by Standard Gas and half by Market Street (T. R. 148–49, 181–82, 339). Cogan and Van Kirk rejected this offer but Cogan made a counteroffer the same day embodying the same terms regarding the fee payments but providing for a reduction of $100,000 in the proposed payment which Standard Gas previously demanded, to $550,000 (T. R.

A. As far as any other matter was concerned, I said, "In case you don't want me as counsel against you on any other matter, perhaps you could give me a retainer." It had nothing to do with the settlement.

Q. You said, "In case you don't want me as counsel against you in any other matter, perhaps you can give me a retainer?"

A. That is right.

Q. You meant an annual retainer?

A. I meant a retainer of any type.

Q. What type did you mean?

A. Well, annual retainer would be one type.

Q. Is that what you meant?

A. Or if they wanted to hire me for a particular case, it would be a retainer for that type. What I had in mind was retainer, money.

* * * * *

Q. It [the request for retainer] was made during a conversation when you were discussing settlement?

A. That is right.

148–339, 40).[10] In a letter incorporating these terms Cogan stated that the settlement was conditioned upon its approval by the Commission (T. R. 149, 182, 610–11). Standard Gas did not accept within the time specified in the offer, and Cogan withdrew it (T. R. 340). By letter dated December 4, 1947, Cogan at the request of Standard Gas renewed his counteroffer (T. R. 149–50, 185, 340) and added approval of the district court as a condition of the settlement (T. R. 149–50, 185, 340, 612–13). On December 6, 1947, Standard Gas accepted this offer (T. R. 152, 185, 340).[11]

The terms of the settlement including the above fee provisions were substantially incorporated in a plan of reorganization filed with the Commission by Market Street on May 3, 1948. In addition, the plan provided for the exchange of releases by Market Street and Standard Gas, the liquidation and ultimate dissolution of Market Street, the payment of such other fees and expenses as might be approved by the Commission, and the pro rata distribution to the prior preference stockholders of its assets remaining after payment and provision for all of its obligations (P. R. 14–15, 27–34). The Commission ordered hearings on the plan and consolidated the investigatory proceedings therewith (P. R. 15–16, 179–90).

[10] This represented a $200,000 increase over Cogan's prior terms as to the amount to be paid by Market Street.

[11] The settlement included a provision that the Van Kirk Committee could name 3 directors of Market Street at the next annual meeting (T. R. 340). This provision was later discarded (T. R. 341).

On September 30, 1949, the Commission issued its findings and opinion which stated that it would approve the plan if it were amended, among other things, to omit any provision for the payment of a fee to Cogan and to reduce the payment by Market Street in settlement of the intercompany claims to $512,500 (the net amount of the agreed settlement after deducting the portion of the fees made payable by Standard Gas to Cogan and the Committee) (P. R. 35–66).[12] Although recognizing that Cogan "was primarily responsible for the development of the basic facts of the relationships between Market Street and Standard [Gas] and the proposed settlement which is embodied in the plan," the Commission disapproved any allowance for Cogan because it found that in negotiating the settlement he "gave such attention to his personal interests and the fees which he hoped to secure, that his obligation of undivided

[12] According to Cogan's testimony it was contemplated that practically the whole fee to be received by the Committee under the proposed plan would be turned over to Van Kirk (T. R. 352–53, 379–80). After the close of the hearings before the Commission the executor of Van Kirk's will advised the Commission that he would be willing to accept $7,500 in lieu of the $25,000 provided for in the plan, and the Commission approved this payment (P. R. 62–63). No allowance was approved to the other members of the Committee. The Commission, however, approved the provision in the plan that Market Street shall reimburse the Committee for expenses in an amount not exceeding $5,000 (P. R. 63). The Commission also approved an allowance of $5,000 to Milton Paulson for the services of himself and his associates to be paid by Market Street, and an allowance of $10,000 to Flynn, Clerkin & Hansen, counsel for Standard Gas, for services rendered and to be rendered in the proceedings, to be paid by Standard Gas (P. R. 63–64).

loyalty to the stockholders whom he represented was not fulfilled" (P. R. 59).

On October 14, 1949, Cogan instituted an action against Standard Power in the United States District Court for the District of New Jersey in the names of the surviving members of the Van Kirk Committee, but without their consent (P. R. 228), and in the name of Charles T. Jones, an appellant herein who owned ten shares of prior preference stock of Market Street. This action seeks to recover on behalf of Market Street $270,000 with interest and a reasonable counsel fee (P. R. 73–74; T. R. 426).[13] The complaint alleged that Standard Power was unjustly enriched in that amount by reason of the receipt by it of the profits on certain management fees charged Market Street for the years 1926 through 1929, pursuant to an agreement dated March 22, 1926, between Standard Gas and associate companies providing for such payment to Standard Power (P. R. 74; T. R. 426–27). Standard Power, as we have seen, is at present a parent of Standard Gas but during the years in question was its subsidiary (P. R. 88).

Market Street thereafter filed an amended plan, dated December 8, 1949 (P. R. 67–85), which conformed to the suggestions in the Commission's opinion. In addition, because of Cogan's New Jersey suit against Standard Power, the amended plan

[13] The Van Kirk Committee in a letter to the Commission dated April 28, 1950, stated that it had not been consulted by Cogan prior to his filing the complaint, and that it was therefore discharging him as counsel for the Committee (P. R. 228).

(P. R. 73–74) provided for a release by Market Street of Standard Gas' subsidiaries as well as Standard Gas (P. R. 70).

On March 9, 1950, after a hearing on its order to show cause why the plan as so amended should not be approved (Holding Company Act Release No. 9597; P. R. 19),[14] the Commission issued its supplemental findings and opinion (Holding Company Act Release No. 9718; P. R. 86–94) in which it reviewed its prior findings and opinion dated September 30, 1949, and the record upon which they had been based. The Commission emphasized that it had independently considered all the service fees paid by Market Street to Byllesby Engineering from 1926 to 1935 in approving the settlement incorporated in the original plan submitted by Market Street, and had treated and appraised the settlement as one which was offered to resolve all controversies between Market Street and Standard Gas and its subsidiaries, past and present, including Standard Power, as a step in the final winding up and dissolution of Market Street under its plan. The Commission, however, required as an additional condition to its approval of the amended plan that it be further amended "to provide clearly for a complete release of Standard Gas and its subsidiaries, including Standard Power."[15] The

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[14] At this hearing, Cogan without authorization from the surviving members of the Committee (T. R. 473) opposed the amended plan. The committee had announced its support of the amended plan in a letter to the Commission dated January 13, 1950 (T. R. 467).

[15] While the amended plan purported to deal with the scope of the release and discharge to be executed by Market Street, it was

supplemental findings and opinion, among other things, also disposed of Cogan's objection to the disallowance of his fee, the Commission concluding that no adequate reason had been presented for changing its prior determination (P. R. 89).

The clarifying amendment suggested by the Commission was incorporated in the amended plan by Market Street (P. R. 95–97)[16] and, on May 3, 1950,

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ambiguous in using the phrase "Standard Gas and its subsidiaries" because, as noted above, Standard Power is not presently a subsidiary of Standard Gas.

[16] The events preceding the adoption of this amendment by Market Street are set forth in the Commission's application to the district court for enforcement of the plan, filed May 3, 1950, as follows (P. R. 21–22):

On March 12, 1950, Cogan sent a night letter to the then President of Market Street urging and advising him not to file the amendment required by the Commission in its supplemental findings and opinion "as being contrary to the interests of Market Street Railway Company and yourself" (P. R. 233). On March 30, 1950, the then Board of Directors of Market Street adopted a resolution refusing to approve such an amendment in view of Cogan's night letter "unless it should hereafter appear to the satisfaction of this Board that other or different action should be taken in respect thereto" (P. R. 225; H. C. A. Release No. 9810; T. R. 241).

On April 14, 1950, a holder of 10,000 shares of prior preference stock of Market Street requested the Commission to enter an order extending to May 15, 1950, the time within which Market Street might file an amendment, so as to permit reconsideration by the Board, after the annual meeting of stockholders to be held April 26, 1950, of the action theretofore taken. The Commission by order dated April 18, 1950, granted the extension (P. R. 225–26; H. C. A. Release No. 9810).

On April 25, 1950, Cogan instituted an action in the court below in behalf of Charles T. Jones, an appellant herein, to enjoin Market Street, its officers, directors and others, from any reconsideration of the Board's resolution of March 30, 1950 (Civil Action File No. 29699), and on the same day the court issued a temporary re-

the Commission entered an order approving the amended plan as necessary and appropriate to effectuate the provisions of Section 11 (b) of the Act and as fair and equitable to the persons affected thereby (H. C. A. Release No. 9834; P. R. 98–102). The Commission, in accordance with the request of Market Street (P. R. 23), then applied to the court below for enforcement of such plan (P. R. 7–26).

On July 7, 1950, after holding hearings on the Commission's application for enforcement, that court in an oral opinion held that the plan was fair and equitable and appropriate to effectuate the provisions of the Act, except insofar as it failed to provide for any compensation to Cogan for his services and except with respect to the amount of fees allowed by the Commission for the services of Paulson and his associates, as to which the court reserved jurisdiction pending the Commission's reconsideration of the matter. In connection with Cogan's fee, the court recognized the existence of a conflict of interests and the necessity of maintaining the "highest ethical standards" for attorneys in Section 11 reorganizations.[17] Nevertheless the court concluded that the

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straining order. On April 26, 1950, the annual meeting of stockholders of Market Street was held and a new Board of Directors was elected. On May 2, 1950, after hearing, the district court dissolved the temporary restraining order, and the new Board thereupon adopted the amendment in question.

[17] The court said (T. R. 741–42):

"However, I think that there was, that by and large that there is an excess of exercise of discretionary power in denying entirely compensation to the counsel for the creditor, for the stockholders who appeared here today and who conducted apparently in great part, as the Commission found, the actual negotiations for settle-

Commission, in disapproving any fee for Cogan, acted "in excess of discretion" (T. R. 750), and that the Commission should approve a "reasonable" fee for Cogan although in a lesser amount than would otherwise be payable to him (T. R. 741–42, 750).[18] By its order dated July 11, 1950 (P. R. 108–13), the court found "that the Commission's disapproval of any allowance of fees for William J. Cogan is not supported by substantial evidence" and sustained as to this point the objections to the approval of the plan, and remanded the proceeding to the Commission for the purpose *inter alia* of fixing a fee for Cogan (P. R. 111).[19] It is from these portions of the order that

ment. I think that he has his eye on his fee—what attorney hasn't?—but I don't think it went to the extent of reaching the point where that superceded the interests of the stockholders. I think it would be too great a punishment to visit upon an attorney for what the record shows he did. Taking away of all compensation, that would be, in my opinion, too drastic. I don't think there is any real basis in this record for doing that. It is true that the highest ethical standards should be maintained. I don't criticize the Commission for endeavoring to maintain those standards in the functioning of the work of the Commission, but I think some lesser degree of exercise of power might as well have accomplished that."

[18] The district court in its oral opinion at first stated that the allowance to Cogan "should be a reasonable one, a substantial one, not a nominal one" (T. R. 742). Later in its opinion, the court stated: "I want to make it clear with respect to the matter of Cogan's fees that the court is not indicating that he should receive $50,000 or $5,000. All that I am intending to do is to remand the case, that the Commission should make under all the circumstances, taking into account all the matters that are before it, an allowance in some reasonable sum for attorney's fees. I am not suggesting what they should be" (T. R. 750).

[19] The district court did not order enforcement of the portion of the plan it approved, because the provisions in the plan relating

the Commission appeals. Cogan, in his own name, and Jones appealed from the remaining portions of the district court order of July 11, 1950. They challenge principally the provision in the plan for a release of Standard Gas and its subsidiaries, including Standard Power, but do not challenge the portions of the order relating to Cogan's fee.

On September 1, 1950, before the appeals by Cogan and Jones from the July 11, 1950, order, Market Street filed with the Commission a modified plan for liquidation and dissolution of Market Street and an application for the Commission's approval thereof under Section 11 (e) of the Act (R. 70–78). The modified plan is in substance the same as the earlier plan approved by the Commission except that it proposed the liquidation and dissolution of Market Street in two steps rather than one, as follows: Step One includes the provisions of the earlier plan theretofore approved both by the Commission and the district court, while Step Two includes provision for the payment of those counsel fees which might ultimately be approved (R. 78–99).

On October 24, 1950, the Commission issued its Second Supplemental Findings and Opinion and Order approving the modified plan (R. 44–61; H. C. A. Release No. 10172) and, pursuant to Market Street's request, applied to the district court for enforcement of Step One of the plan (R. 35–43). The district court, on November 21, 1950, issued its enforcement

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to fees were not then severable from the rest of the plan dealing with the settlement of Standard Gas' claim and the liquidation and dissolution of Market Street.

order (R. 1–11), and Cogan and Jones appealed to this Court from that order. This appeal has been consolidated with the appeals from the July 11, 1950, order (R. 104–7). On December 13, 1950, Cogan applied to the district court for a stay of the enforcement order insofar as it required Market Street to release Standard Gas and its subsidiaries, including Standard Power. The application for stay was denied on December 18, 1950, and Step One of the plan has since been consummated.

SPECIFICATION OF ERROR

The court below erred in finding not supported by substantial evidence the Commission's disapproval of any allowance of fees for William J. Cogan and in remanding the proceeding to the Commission for the purpose of fixing a "reasonable" allowance for Cogan.[20]

SUMMARY OF ARGUMENT

I

Both the Commission and the district court found that Cogan pursued conflicting self-interest in negotiating, on behalf of a committee of stockholders of Market Street, a settlement of the cross-claims between Market Street and Standard Gas. At a time when the parties were $300,000 apart on what Market

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[20] Pursuant to a stipulation of the parties approved by this Court (R. 104–107), this brief contains the arguments of the Commission not only with respect to the error specified above by the Commission as an appellant in No. 12,716 (Point I, *infra*) but also in answer to the arguments we anticipate will be made by Cogan and Jones as appellants in Nos. 12,716 and 12,813 (Point II).

Street should pay to Standard Gas, Cogan made payment of a $50,000 fee to him a specific condition of the settlement which he was offering and attempted, unsuccessfully, to obtain a retainer from Standard Gas as a protection against his opposing Standard Gas in other matters. Thereafter, the amount of the fee was not the subject of further negotiation, while the amount of Cogan's offer was ultimately increased by $200,000, and the amount Standard Gas was willing to accept was reduced by $100,000. The Commission, in the exercise of its discretion, concluded that Cogan was not entitled to any fee for his contribution to the plan.

The district court erred in holding that the Commission's disapproval of any fee for Cogan was not supported by substantial evidence and was an abuse of discretion, and in remanding the proceeding to the Commission for the purpose of fixing a reasonable fee for Cogan although, as a penalty for his misconduct, in an amount less than would otherwise have been allowed to him. The court's position is inconsistent with a fundamental policy in bankruptcy reorganization proceedings requiring loyal and disinterested service by fiduciaries as a condition to their compensation, would encourage the tendency to evil in other cases, and would impose upon the Commission the impossible task of measuring in every case the effect of representation of conflicting interests. Whether or not the Commission's decision represents a more stringent rule than is applied to fee allowances in bankruptcy, the Commission is not precluded under the Holding Company Act from invoking higher

standards of fiduciary conduct for committee counsel, based on its experience in administering the Act.

II

Cogan supported as fair and equitable the settlement of Standard Gas' open account claim against Market Street incorporated in the initial plan, which provided for an exchange of releases between Market Street and Standard Gas. This settlement was negotiated on the basis of evidence indicating that Market Street had a cross-claim for excessive fees paid for management services from 1926 until passage of the Holding Company Act in 1935.

It was not until after the Commission had disapproved a fee for Cogan, although indicating approval of the principal provisions of the plan, that Cogan revealed his intention to assert an additional claim on behalf of Market Street against Standard Power. This claim, which he has asserted in a derivative action, is based upon the circumstance that during the earlier part of the period when the allegedly excessive service charges were exacted, Standard Power, which was then a subsidiary of Standard Gas, received the profits therefrom. At the time of the settlement and now, Standard Power, as a stockholder of Standard Gas and its parent company, was indirectly interested in the settlement and necessarily affected by any concessions made by Standard Gas. Both the Commission and the district court agreed that the plan was fair and equitable after it was amended to provide expressly for a release of Standard Power as well as

Standard Gas. This decision was amply supported by the evidence.

Both the Commission and the district court also agreed that the release of Standard Power was fairly implicit in the settlement as previously approved by the Commission. Cogan's conduct prior to the disallowance of his fee was inconsistent with any intent to preserve a cause of action against Standard Power. Both as a participant in the investigation, and as a supporter of the settlement he had negotiated, he had relied upon all the facts and circumstances surrounding the management services rendered to Market Street during the entire period from 1926 to 1935.

ARGUMENT

I

The District Court erred in rejecting as not supported by substantial evidence and an abuse of discretion the Commission's disapproval of any fee for Cogan

A. Cogan's pursuit of an antagonistic personal interest is clear

The district court's oral opinion makes it clear that it agreed with the Commission's finding that Cogan had improperly pursued his conflicting personal interests while negotiating on behalf of the stockholders' committee a settlement of the inter-company claims (T. R. 741–42, quoted at page 16, note 17, *supra*). These concurrent findings are amply supported by the evidence.

At a time when the parties were still $300,000 apart on what should be paid to Standard Gas, Cogan both made payment of a $50,000 fee to him a specific condition of any settlement which he was

offering[21] and attempted to induce Standard Gas to offer him a retainer as a protection against his bringing additional actions against Standard Gas. While the effort to obtain a retainer was not pressed after rejection by Standard Gas, it is highly revealing concerning Cogan's concept of fiduciary responsibility. In subsequent negotiations, as the Commission found, the amount of the fee to be paid Cogan was in effect a settled amount and all that remained was settlement of the cross-claims. There is no way of determining whether and to what extent agreement on the amount of Cogan's fee in advance of a settlement made his negotiations in behalf of the stockholders less aggressive than they had a right to expect. Thus, as stated by the Commission (P. R. 61–62):

> We find it unnecessary to speculate whether Cogan was then motivated only by the desire to secure a settlement which would be consonant with and sustain his fees or whether a more favorable settlement could have been achieved, since we think it clear that he had so compromised his bargaining position that the Prior Preference Stockholders were no longer receiving the representation to which they were entitled. Thereafter, a determination by Cogan of the degree of pressure to be put on Standard was subject to consideration of what had become his personal stake.[22]

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[21] See pages 9–11, *supra*.

[22] As we have seen, Cogan, in behalf of the Van Kirk Committee, thereafter increased by $200,000 the amount which he previously had offered to Standard Gas, and Standard Gas in accepting that offer reduced by $100,000 the amount previously demanded by it in settlement.

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Cogan argued below that this finding of the Commission is unwarranted because he made the settlement including the fee provision subject to the approval of the Commission and the district court. His acceptance of any settlement of the cross-claims, however, was conditioned upon the payment of his fee in the specified amount (T. R. 453–54). Thus, unless his fee had been agreed to by Standard Gas, there would have been no settlement for the Commission or district court to consider.[23] Cogan's argument in effect would excuse any pursuit of conflicting interests on the part of an attorney-fiduciary merely

[23] The pertinent text of Cogan's letter of November 5, 1947, addressed to the secretary of Standard Gas in which this condition is stated, follows (T. R. 611):

"The committee is willing that Market Street Railway Company pay to Standard Gas & Electric Company the sum of $550,000 in full liquidation of the open account, provided that Standard will pay to me the sum of $25,000 and to the committee the sum of $12,500 from said sum, to represent one-half of the fees we propose to charge and upon the assumption and condition that Market Street Railway Company will pay a like sum to each;

"The offer is dependent upon authorization by the Securities and Exchange Commission of the above proposed settlement in accordance with the terms set forth and in the event the Commission does not authorize said settlement, I wish it understood that the offer of settlement is made without prejudice to any and all other rights the committee and the prior preference stockholders it represents may have in the matter."

In a letter dated December 4, 1947, addressed to the vice president of Standard Gas, Cogan, after restating the offer of settlement set forth in his letter of November 5, stated (T. R. 612–13):

"Supplementing said offer and by way of clarifying the proposed commitment of Standard Gas & Electric Company, I am willing that the settlement be conditioned both upon its approval by the Securities and Exchange Commission and by the United States District Court at San Francisco * * *."

because the transactions in which he engaged are subject to the approval of an administrative agency or court. Such circuitous reasoning would completely nullify in plan proceedings the rule which requires loyal and disinterested services by fiduciaries.[24] The fact that the conflict here arose in connection with fees does not distinguish this case from one where a conflict based on the attorney's personal interest in the sale of his client's property resulted in the total disallowance of a fee. See *Tracy* v. *Willys Corporation,* 45 F. 2d 485 (C. A. 6, 1930).

Of perhaps even more significance in showing the nature and extent of Cogan's pursuit of self-interest is his attempt in the midst of negotiations to obtain a retainer from Standard Gas (see note 9, *supra*). He took the position before the Commission that his request for a retainer "was accepted as a sort of a brag" (P. R. 214), and in the district court that it was "made as a brag," was "not intended as a serious suggestion," and was "accepted as a jest."[25] These explanations, however, are inconsistent with previous explanations of his motive in asking for a retainer which tend to show that the request was made quite seriously. He testified on

[24] The fact that Cogan has made every effort to undermine the settlement and to delay the liquidation of Market Street, after the Commission disapproved the provisions of the plan relating to his fee, emphasizes the extent to which his antagonistic self-interest has conflicted with the interests of the Committee for which he was acting. As above noted, Cogan abandoned the position of the Committee which supported the plan, and the Committee has dissociated itself from his subsequent activities.

[25] Brief for Jones and Cogan on application of S. E. C. for enforcement order, dated June 19, 1950, p. 41.

cross-examination at the Commission hearings as follows (T. R. 378):

> Q. Did you have any reason to believe that Standard [Gas] might wish to retain you as its counsel?
>
> A. I didn't know whether they would or they wouldn't. * * *
>
> Q. What prompted your request?
>
> A. Because I felt that if they wanted to do it, they could do it. They were all executives of Standard Gas & Electric Company.
>
> Q. Mr. Hansen, in fact, was one of their counsel, wasn't he?
>
> A. That is right, and they had three or four counsel. They had Sammond, although he wasn't counsel for Standard [Gas] in that particular case. There is no reason why they couldn't have another counsel in New York or somewhere else if they saw fit to do it.
>
> Q. And you were suggesting if they did that, you wouldn't be opposing them in any other matters?
>
> A. Naturally I couldn't.

Similarly, in oral argument before the Commission, Cogan stated he wished to represent Standard Gas because certain utility companies had causes of action against Standard Gas and he "had no client in any of those cases" (T. R. 487; see also T. R. 608–9; P. R. 215).

If any humor was involved in his request for a retainer, it was only in the reaction it elicited from one of the Standard Gas attorneys attending the conference. As Cogan stated in oral argument before

the Commission (T. R. 487–88; cf. T. R. 179; P. R. 214):

> * * * although it is not in the record my later recollection indicates that the only response to that suggestion was a laughing remark by Mr. Reynolds, who was present and one of the attorneys for Standard Gas, that if Standard Gas had any more attorneys they would have more attorneys than they had employees. We all laughed, and that was the end of that.

The fact that Cogan's request for a retainer was made the occasion for a humorous remark does not mean that the request was made in jest or "accepted as a jest" by Standard Gas' representatives, as Cogan asserts.

Cogan in oral argument has pointed to the fact that Standard Gas did not accede to his request for a retainer, and therefore no conflict of interests could have resulted therefrom. But Cogan's serious attempt, in the midst of negotiations for settlement, to obtain the adverse party as a client and to use as an inducement the threat of bringing other suits in situations where he did not as of that time have anyone to represent, further high-lights the extent to which he permitted his self-interest to compete with the interest of the stockholders whom he undertook to represent.

B. The Commission did not abuse its discretionary power under the act in denying any fee, rather than attempting to decide the worth of Cogan's services—less an appropriate penalty for his misconduct

The court below, in holding that the Commission abused its discretion in refusing to approve any al-

lowance to Cogan, has taken a position inconsistent with a fundamental policy in bankruptcy reorganization proceedings requiring "loyal and disinterested service" by fiduciaries as a condition to their compensation, as affirmed by the Supreme Court in *Woods* v. *City Bank Co.,* 312 U. S. 262 (1941). In that case, the Court upheld the power of a reorganization court to deny any compensation to attorneys and other fiduciaries who represented the conflicting interests of the mortgagee and equity owners in a Chapter X reorganization proceeding, and refused to inquire whether the representation of conflicting interests was in fact prejudicial to either client. The *Woods* decision was approved in *Brown* v. *Gerdes,* 321 U. S. 178, 182 (1944), and was followed in *In re Midland United Co.,* 159 F. 2d 340 (C. A. 3, 1947). See also *Crites, Inc.* v. *Prudential Insurance Co.,* 322 U. S. 408 (1944); *In re Ritz Carlton Restaurant & Hotel Co.,* 60 F. Supp. 861, 866 (D. N. J., 1945).

While there is no proof that Cogan permitted his self-interest to color his judgment as to whether he was obtaining the best possible settlement from the standpoint of the stockholders whom he represented, the decision below would encourage the "tendency to evil in other cases." *Weil* v. *Neary,* 278 U. S. 160, 173 (1929). Moreover, the impossibility of measuring the effect of representation of conflicting interests proves the wisdom of the rule that no inquiry should be made into whether or to what extent representation of conflicting interests in fact harmed the interest of the client. As stated in the *Woods* case (312 U. S. at 268):

> * * * the incidence of a particular conflict of interest can seldom be measured with any degree of certainty. The bankruptcy court need not speculate as to whether the result of the conflict was to delay action where speed was essential, to close the record of past transactions where publicity and investigation were needed, to compromise claims by inattention where vigilant assertion was necessary, or otherwise to dilute the undivided loyalty owed to those whom the claimant purported to represent. *Where an actual conflict of interests exists, no more need be shown in this type of case to support a denial of compensation.* [Emphasis supplied.]

The Court of Appeals for the Second Circuit has recently departed from the rule of total forfeiture in determining fee allowance in bankruptcy reorganizations where a conflict of interests is found to exist. In *Silbiger* v. *Prudence Bonds Corporation,* 180 F. 2d 917 (C. A. 2, 1950), a Section 77B proceeding, it held that an exception to the usual rule totally barring compensation to an attorney who represents conflicting interests should be made in the case of corporate reorganizations, and that the bankruptcy court which had granted a full allowance to Silbiger must diminish, but may not require a total forfeiture of, the fee otherwise payable by the estate which benefited from his services by taking into account the character of the conflicting representation. Specifically, the court decided that an exception to the rule of total forfeiture should be made where it can be shown that the evil of conflicting rep-

resentation is mitigated because "the client [prejudiced by the attorney's divided allegiance] is otherwise adequately protected, and the attorney is not paid in any part by the party whose side he has opposed.

While we disagree with the *Silbiger* case,[26] nevertheless, even assuming the validity of the *Silbiger* exception, it would not apply to the facts of the instant case since any fee allowed to Cogan would be paid at the expense of the stockholders whose interests were in conflict with his own. Moreover, Cogan can hardly contend for the adequacy of such stockholders' representation by others since it was at his insistence that Paulson, the only other attorney for prior preference stockholders in the proceeding, was ex-

[26] The Commission, as *amicus curiae*, and the R. F. C. filed a joint memorandum in the *Silbiger* case in support of a petition to the Supreme Court for a writ of certiorari on the grounds that the decision is erroneous and is in conflict with the decisions of the Supreme Court and the Court of Appeals for the Third Circuit. Certiorari was denied, 340 U. S. 831.

Compare *Berner* v. *Equitable Office Building Corp.*, 175 F. 2d 218 (C. A. 2, 1949), where the attorney for a stockholder in a Chapter X proceeding transmitted confidential information with respect to the reorganization to a relative, as a result of which the Court of Appeals held "that there was proof of conduct which required his allowance to be reduced in an amount which the district court should fix in its discretion, and which might go so far as to extinguish any allowance whatever" (at p. 219). The Court of Appeals treated these facts as involving not a case of representing conflicting interests, nor as one under Section 249 of the Bankruptcy Act which deals with the effect of trading upon the allowance of fees, but as one involving a breach of fiduciary duty which, depending on the "gravity of the breach" (at p. 222), might not completely bar compensation to the trustee, citing the Restatement of Trusts, Section 243. See 63 Harv. L. Rev. 1056.

cluded from the settlement negotiations (P. R. 47; T. R. 383, 486).

But whatever the rule applied by the courts in bankruptcy reorganizations, the Commission is not precluded under the Holding Company Act from invoking higher standards of fiduciary conduct based on its experience in administering the Act, so long as its action is not arbitrary or capricious.

This principle has been established by the Supreme Court in a related context in the *Chenery* cases. In the first *Chenery* case, the Commission, on the basis of judicial precedents, refused to approve a plan of reorganization under the Holding Company Act so long as preferred stock purchased by the management during the reorganization proceeding was to be treated on a parity with other preferred stock. The Supreme Court, however, held that those precedents did not sustain the action of the Commission and remanded the cause to the Commission for further proceedings. *S. E. C.* v. *Chenery Corporation,* 318 U. S. 80 (1943). The Commission then reexamined its action and decided, on the basis of its experience in administering the Holding Company Act, that to give parity treatment to the management's acquisitions would conflict with the standards of the Act. This time the Supreme Court sustained the Commission's action because its order indicated that the Commission "intended to create new standards growing out of its experience in effectuating the legislative policy" embodied in the Act. *S. E. C.* v. *Chenery Corporation,* 332 U. S. 194, 198 (1947). As stated by the Court (332 U. S. at 199,209):

> The latest order of the Commission definitely avoids the fatal error of relying on judicial precedents which do not sustain it. This time, after a thorough reexamination of the problem in light of the purposes and standards of the Holding Company Act, the Commission has concluded that the proposed transaction is inconsistent with the standards of §§ 7 and 11 of the Act. It had drawn heavily upon its accumulated experience in dealing with utility reorganizations and it has explained its reasons with a clarity and thoroughness that admit of no doubt as to the underlying basis of its order.
>
> * * * * *
>
> The Commission's conclusion here rests squarely in that area where administrative judgments are entitled to the greatest amount of weight by appellate courts. It is the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts. It is the type of judgment which administrative agencies are best equipped to make and which justifies the use of the administrative process * * * Whether we agree or disagree with the result reached, it is an allowable judgment which we cannot disturb.

See also *S. E. C.* v. *Central-Illinois Securities Corporation,* 338 U. S. 96 (1949); *American Power & Light Co.* v. *S. E. C.,* 329 U. S. 90, 112–13 (1946); *Halsted* v. *S. E. C.,* 182 F. 2d 660 (C. A. D. C., 1950), certiorari denied 340 U. S. 834.

Assuming that the Commission's decision in the instant case does represent, which we dispute, a

stricter rule than applies to fee allowances in bankruptcy, there is nevertheless a far stronger basis here for allowing latitude for the Commission to fashion new standards than existed in the *Chenery* cases. The heart of the controversy in the *Chenery* cases was over the propriety of retrospective sanctions for conduct which, according to the majority of the Supreme Court in the first *Chenery* case, was not proscribed by any antecedent rule including the equity precedents relied on by the Commission (see 318 U. S. at 88–89). The Commission was there regarded as plowing new ground in creating a new exception to the normal rule which permits corporate managers of a solvent company to purchase securities of their company for their individual profit. Cf. *Manufactures Trust Co.* v. *Becker*, 338 U. S. 304 (1949). Here there is no novelty in the rule, recognized by the district court as well as the Commission, that an attorney owes undivided allegiance to his client, and the Commission's jurisdiction to approve reorganization fees necessarily submits to its retrospective evaluation the conduct of the person claiming a fee.

The Commission's jurisdiction to approve the fee of a committee or its counsel is an undisputed aspect of the Commission's power under Section 11 (e) to hear and pass upon plans for corporate reorganization. To encourage adequate representation of all interests and full exploration of the issues in such reorganizations, it is the Commission's practice to require the companies undergoing reorganization to pay reasonable fees to all interested participants who request compensation from the reorganization estate

for services in aid of or beneficial to the reorganization process. See *In re Electric Bond & Share Co.*, 80 F. Supp. 795, 798 (S. D. N. Y. 1948), cited with approval in *Halsted* v. *S. E. C.*, 182 F. 2d 660 (C. A. D. C., 1950), certiorari denied 340 U. S. 834. In addition the Commission is given express power to require that reorganization fees be subjected to its approval notwithstanding provisions which might otherwise subject such fees to judicial discretion. See Section 11 (f). The *Halsted* case upheld the Commission's power to restrain a committee from soliciting contributions from security holders as necessary to avoid circumvention of the Commission's jurisdiction over fees, the court stating (at page 665):

> What is really in issue in this case is not representation; it is fees. True it is that the extent and quality of representation may be intimately related to the size of the representative's fee. But we cannot conclude from this that every group in a reorganization must be allowed unlimited fees. Protection of investors requires a different standard, and Congress has so decreed. The express provisions of section 11 (f), quoted above, give the Commission direct control over the fees to be allowed in enumerated proceedings under the Act. We cannot ignore this provision, or invite its evasion.

From its experience in handling the problem of attorneys' fees the Commission has determined that the highest standards must be met if the interests of public security holders are to be protected. Enforcement of the highest standards is especially important

in the case of attorneys who represent stockholder committees, since the stockholders are generally scattered and in no position to supervise the attorney's conduct. The Commission believes that if in the circumstances of this case it is required to grant some allowance to Cogan, as the district court directed, it would encourage attorneys who undertake to act as fiduciaries to place their own interests ahead of the interests of their clients since, if their self-interest is discovered, they may lose only part of the fee they would otherwise be awarded. Thus, to require the Commission to measure in money the effect of representing conflicting interests can only result in the "disintegrating erosion" of the fiduciary standards which the Commission considers vital to its effective administration of the Act. See *Wendt* v. *Fischer,* 243 N. Y. 439, 443–444, 154 N. E. 303, 304 (1926).

II

The Commission and the Court below properly approved as fair and equitable the provisions in the plan for (1) the payment by Market Street to Standard Gas of the sum of $512,500 in settlement of Standard Gas' claim on open account against Market Street, and (2) the release of Market Street's cross-claim against Standard Gas and its subsidiaries, including Standard Power, for the profits realized by them on the fees charged to Market Street for management services from 1926 to 1935

As shown above, Market Street's initial plan provided, *inter alia,* that the open account, which at June 30, 1948, amounted to $990,832 according to the books of Market Street and $1,132,691 according to the books of Standard Gas, was to be settled by a net payment of $512,500 by Market Street to Standard

Gas, and that Market Street and Standard Gas were to exchange releases of any liability "for any cause whatsoever" (P. R. 30–31). The principal basis for the reduction of Standard Gas' claim against Market Street, as developed in the investigation before the Commission, had been a showing that Market Street had been overcharged for management services from 1926 until passage of the Holding Company Act in 1935. While the Commission made no finding as to the total amount of the overcharges, Cogan claimed that the overcharges amounted to about $1,200,000, including interest (see T. R. 727).

Standard Power as a parent company having a stock interest in Standard Gas, while not directly involved in the settlement negotiations, was affected along with public security holders of Standard Gas, by any concessions made by Standard Gas in the settlement. Prior to the Commission's disapproval of the Cogan fee, there was no intimation that Cogan regarded Market Street as having a claim against Standard Power which would survive the settlement. Immediately after Commission disapproval as expressed in the findings of September 30, 1949, Cogan started a derivative suit on behalf of Market Street, seeking to charge Standard Power with so much of the profits from the services rendered to Market Street as were traceable to Standard Power. To obviate any uncertainty as to whether such suit was already precluded by the plan it was amended to provide for a release of all "liability, past or present, of Standard [Gas] and its subsidiaries, including Standard Power and Light Corporation, a Delaware

corporation (presently the parent of Standard), to Market Street for any cause whatsoever" (P. R. 96).

It is the plan as so amended which both the Commission and the district court approved as fair and equitable, and the principal issue posed by Cogan's and Jones' appeals is whether this was error. A subsidiary issue is whether the Commission's approval of the plan as so amended, or Cogan's objections to the plan as so amended, are consistent with their respective prior positions in which Cogan supported the settlement in the form substantially approved by the September 30, 1949, findings. The Commission held and the district court agreed that the compromise with Standard Gas necessarily implied under the circumstances a full settlement of all claims of Market Street growing out of the Byllesby Engineering servicing arrangement.

The Commission opinion approving the settlement in the initial plan which provided for an exchange of releases by Market Street and Standard Gas (without any reference therein to the subsidiaries of Standard Gas) was based upon the following considerations. Pursuant to a management contract between Market Street and Byllesby Engineering, Market Street was charged $1,562,500 for supervision fees from 1926 to 1935 (P. R. 50–51). Of this amount about $375,000 was paid to Samuel Kahn for his services as the president of Market Street and the balance of $1,187,500 for other services under the contract (P. R. 51–52). The Commission, while observing that "some services were rendered and were valuable" was unable to determine from the record

the exact nature or extent of those other services (see P. R. 147), and found upon the basis of the record that Market Street was grossly overcharged for the services which it received (P. R. 55).[27] Buttressing this finding was the fact noted by the Commission that Standard Power, which directly or indirectly controlled Market Street from 1926 to 1930 (T. R. 434–35) and was then itself a subsidiary of Standard Gas, received from Byllesby Engineering $270,000 out of the $675,000 in fees collected from Market Street during that period pursuant to agreements between Standard Gas and associate companies which provided that the profits on the supervision fees should go to Standard Power (T. R. 584; P. R. 52–53).

The open account per books of Market Street[28] represented $231,250 of unpaid management fees which were either paid or assumed by Standard Gas in 1932 and 1933, $478,095 of unpaid cash advances by Standard Gas (out of a total of $784,000 of cash advances from 1931 to 1935), and unpaid interest. Of the total of $784,000 of cash advances, $700,000 represented loans made in 1931, 1932, and 1933 to

[27] Since the settlement was reached during the course of the hearings, Standard Gas reserved the right in the event the settlement was not approved to proceed with its own investigation into the cost of the services rendered by Byllesby Engineering under the management contract (P. R. 53). Cogan conceded the possibility of a larger recovery by Standard Gas in a suit since it is "in a position to offer evidence of value of the services which were rendered" (P. R. 195; see P. R. 221).

[28] A summary of the principal charges and credits in the open account as of December 31, 1947, as shown on the books of Market Street, appears at P. R. 54. See also T. R. 1–D–E.

service Market Street's bonded indebtedness, and $84,000 was an advance in 1935 to enable Market Street to pay management fees to Byllesby Engineering (P. R. 55).

The Commission in examining the various aspects of the settlement observed that the problem was essentially "one of appraising whether the 'give-up' by Standard [Gas] of all of the open account, except an amount which approximates the balance of cash advances for bond servicing plus interest, results in a fair settlement" (P. R. 55–56). The Commission considered the desire of all the participants in the proceedings to settle, the value of prompt disposition in an enterprise where "expenses can be expected to exceed income," and the cost to the prior preference stockholders of protracted proceedings and litigation (P. R. 56),[29] and concluded that while "it is impossible to pin-point a fair settlement and a range is the best that can be achieved * * * $512,500 falls within the realm of fairness * * *" (P. R. 57).[29a]

As we noted above, after the Commission's findings and opinion of September 30, 1949, Cogan on Octo-

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[29] See, for example, Cogan's brief filed with the Commission in behalf of the Van Kirk Committee in support of the initial plan which stated (P. R. 196): "Settlement at this time will facilitate the orderly liquidation of Market Street Railway Company, will determine to a degree the probable distribution per share of prior preference stock, and will tend to minimize the time within which such liquidation can be completed and thereby save some operating expense."

[29a] The propriety of resolving similar issues by a settlement embodied in a plan under Section 11 (e) of the Act, rather than litigating them to a final conclusion, is not in dispute. See *In re North American Light & Power Co.*, 170 F. 2d 924 (C. A. 3, 1948); In re *Electric Power & Light Corporation*, 176 F. 2d 687 (C. A. 2, 1949).

ber 14, 1949, instituted a suit in the United States District Court for the District of New Jersey in the names of the surviving members of the Van Kirk Committee, but without their approval or advice (P. R. 225–26), and in the name of Jones, to recover on behalf of Market Street the $270,000 received by Standard Power from 1926 through 1929, together with interest thereon. Thereafter, an amended plan was filed by Market Street in conformance to the Commission's opinion, omitting the provision for a fee to Cogan and, because of the New Jersey suit, providing for a release not only of Standard Gas but of its subsidiaries.[30] At the Commission's hearing on January 16, 1950, on its order to show cause why the plan as amended should not be approved, Cogan took the position that the settlement was intended to cover only the open account due from Market Street to Standard Gas as it appeared on the books of Market Street and not the overcharges for services rendered to Market Street prior to the beginning of that open account on Market Street's books in 1931 (T. R. 404). He argued that while the service charges for the years 1926 through 1929 were considered in the Commission's investigative proceedings (T. R. 404), and "even though our discussion, including overcharges, went

[30] As we have seen, the Commission on March 9, 1950, approved this plan on condition that it be amended to provide clearly for a release of Standard Power, and such amendment was ultimately filed and the plan as so amended, approved. The Van Kirk Committee declared its support of the plan as amended to provide such a release, and announced it was discharging Cogan as counsel for the Committee (P. R. 227–28).

back to 1926" (T. R. 439), they were not reflected in the open account on Market Street's books which was made up of charges and credits entered in 1931 and subsequent years and consequently were not included in the settlement (T. R. 406–7, 438–39). He asserted that the terms of the settlement as first submitted to the Commission, before incorporation in the Section 11 (e) plan, contained no reference to a general release of Standard Gas (see T. R. 396–97, 424), and that while he had made no specific objection to a general release of Standard Gas as proposed in the initial plan which he supported (T. R. 244, 247, 427), he was now opposed to a release of either Standard Gas or Standard Power (T. R. 427–29).[31]

In our view, there is no substance to his arguments, and his opposition to the modified plan is nothing more than, as characterized by the court below, "an obstructive practice" (R. 21). Until the hearing on the order to show cause, Cogan never disclosed that he was attempting to preserve an independent cause of action against Standard Power (see T. R. 405), although, as he claimed, he had discovered this cause of action long before the Commission issued its findings and opinion on the initial plan.[32] He offered

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[31] Compare, however, the later assertion by Cogan's co-counsel that the settlement contemplated the release of Standard Gas (R. 13). It should be noted that Cogan, in objecting to the amended plan, was purportedly speaking as counsel for the Van Kirk Committee, although the Commission had received a letter from the Committee, dated three days earlier, which announced its approval of the amended plan (T. R. 467, 473).

[32] At this hearing Cogan stated (T. R. 409):

"At the time of the last hearing before the Commission, on December 9th [1947,] Mr. Seigel, counsel for Ladenburg, Thalman

as an excuse for not disclosing to the Commission his intention to bring suit against Standard Power his fear that Paulson "might take similar action" (T. R. 439), and on another occasion he asserted "there was no duty to inform the S. E. C. of the proposed action against Standard Power" (P. R. 107). This attitude on the part of Cogan, we submit, shows a callous disregard

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& Company, produced for record either two or three agreements which had not theretofore been available for consideration and analysis.

"After considering and analyzing these agreements, I concluded that the $270,000 which the record showed had been paid to Standard Power & Light Corporation was no more than a participation in monies unjustly charged to Market Street Railway Company, and I would have the right to sue them for unjust enrichment, since the equities between them and Market Street Railway were such that they could not justify receiving that and the agreement indicated they paid no consideration.

"Now, while ordinarily I would be disposed to give Standard Gas & Electric a release, I see no reason why we should extend the terms of the agreement as made, and give them a release and provide Standard Power & Light Corporation with at least a shadow of a special defense."

Compare Cogan's earlier reference, shortly after the Commission's findings on the initial plan, to a cause of action in favor of Market Street against an unnamed defendant:

"And the final reason [for recommending to Van Kirk that he accept the proposed settlement] was that I had concluded a good cause of action existed in favor of Market Street Railway Company, which I would assert at an appropriate time, and which would result in Market Street Railway Company actually finishing up by saving a figure approximately equal to the full amount of the open account, which was asserted by Standard Gas & Electric Company." Cogan Memorandum to S. E. C. re Request for reargument, Oct. 11, 1949 (P. R. 221).

It is significant that Cogan now objects to a release of Standard Gas because of a claimed right of action against Standard Power, yet did not object to the provision for such a release in the original plan although presumably aware at that time of that alleged cause of action.

of his obvious duty as a volunteer undertaking the representation of a stockholders' committee in a Section 11 proceeding before the Commission to make full disclosure to the Commission of all relevant facts, especially his alleged intention to preserve a cause of action after a settlement which, as we show below, he admittedly negotiated on the basis that it covered all claims arising out of the overcharges for management services. As stated by the district court in this connection (T. R. 741):

> I don't think it would be in the interest of justice at this stage now to even urge the court here to conclude that the tricky deal the attorney for the objecting parties thought he was making might be eventually sustained.

Prior to the disallowance of his fee, Cogan's entire participation in the proceedings before the Commission was inconsistent with any intent to save a cause of action until after approval of the plan. The record shows that he brought before the Commission detailed facts and circumstances surrounding the management services rendered to Market Street by Byllesby Engineering during the entire period from 1926 to 1935, including the roles played by Standard Gas and Standard Power. It was at his request, as counsel for the Van Kirk Committee, that the Commission ordered the public investigation into the relationships among Market Street, Standard Gas, and Byllesby Engineering, and an examination and analysis of the service charges paid by Market Street during the entire period of its history as a company in the Standard Gas system. H. C. A. Release No. 7425 (May 20, 1947). He put into evidence numerous documents and schedules and

a mass of correspondence relating to the whole period from 1926 to 1935, and most of this material was secured by him as a result of subpoenas issued by the Commission at his request (T. R. 9–10, 13–14; P. R. 91–92, 154–67). In his examination of witnesses, his colloquies with the trial examiner, and in oral argument, he directed his questions and his remarks to the "fraud" perpetrated against Market Street from 1926 to 1935 and to the diversion to Standard Power of profits on the overcharges for services rendered to Market Street from 1926 through 1929 (T. R. 1–A, B, E, F, I, J, K, O, T, W).[33] He referred to Lea Rosen's answer, as intervenor, to the complaint filed by Standard Gas in its action on the open account, as charging that Standard Gas by virtue of its control of Market Street had caused Market Street to pay excessive fees for services from "1924 to 1935," but he then gave no indication that the alleged set-off should be limited to the years 1930 to 1935 (T. R. 344–45). Thus, the Commission in appraising the fairness of the settlement necessarily considered all the service fees paid by Market Street to Byllesby Engineering from 1926 to 1935, and particularly noted that $270,000 of such fees was paid over by Byllesby Engineering not to its own parent, Standard Gas, but to its then co-subsidiary, Standard Power.[34]

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[33] Cogan also considered pertinent to the issues a possible diversion of some of the profits to Kahn while president of Market Street and to other officers of companies in the Standard Gas system. However, as far as we know, no action has been instituted against any of them (T. R. 1–K–M, R–S).

[34] Cogan can hardly be heard to complain of the Commission's assumption in its initial findings that a release of Stand-

While the Commission did not specifically consider a possible cause of action for unjust enrichment against Standard Power, nor hold a formal hearing thereon, as Cogan argued in the district court (T. R. 722), the subject matter of that cause of action, namely, the overcharges paid by Market Street from 1926 through 1929, and the fact that Standard Power received them, were fully developed at the Commission's investigatory hearing, at its hearings on the initial plan, and at its hearing on the order to show cause why the plan as amended to provide a release of the subsidiaries of Standard Gas as well as Standard Gas should not be approved.[35] Cogan admitted at the hearing on the order to show cause that the record "covers all transactions had between Market Street Railway Company and Standard [Gas] and its affiliates, in so far as they were presented as evi-

ard Gas would effectively dispose of all causes of action arising out of the overcharges since 1926, in view of the fact that Cogan frequently charged, in papers filed with the Commission before the settlement, that Standard Gas had controlled Market Street since 1925 and was responsible for all the overcharges (P. R. 125–26, 140, 148, 151, 153, 163). Indeed, he repeated the charge in the district court in connection with Standard Gas' suit on the open account, after the settlement was reached, with full realization of the diversion of profits to Standard Power (P. R. 171, 176–77, 178).

[35] Cogan objected below to the Commission's calling the argument on the order to show cause a "hearing" (P. R. 106–107). It should be noted that after presenting his argument at that "hearing," Cogan took the stand and swore to the truth and correctness of the "factual statements" in his argument (T. R. 457–466), and was then cross-examined on other matters (T. R. 468–473).

dence" (T. R. 404).[36] In view of the completeness of the Commission's findings issued in connection with the plan and the amendments thereto, and the extensive administrative record, we cannot understand how a formal hearing on this question could have added anything of significance to the record in this proceeding.

Cogan's argument, in connection with the charge that he was subject to a conflict of interests, that there was in fact arm's-length bargaining between himself and the representatives of Standard Gas, is inconsistent with his admission that he had mental reservations with respect to the coverage of the settlement which he did not communicate to Standard Gas. In any event, as previously indicated, the record afforded the Commission sufficient information upon which it could and did determine independently whether a settlement which purported to embrace the open account and the overcharges on service fees during the entire period from 1926 to 1935 was fair and equitable. It is therefore immaterial whether or not Cogan intended in his negotiations with Standard Gas to settle all claims which Market Street might have against Standard Gas and its subsidiaries, including Standard Power.

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[36] And see Cogan's statement in an affidavit in support of the settlement filed in March 1948 in *Standard Gas & Electric Company* v. *Market Street Railway Company* (at P. R. 178):

"This affidavit is made solely for the purpose of supporting the proposed settlement and in the hope that it will provide the Court with enough facts to warrant the Court in accepting the proposed settlement *without further proof*." [Emphasis supplied.]

The record shows, however, and the district court found that Cogan as well as Standard Gas in fact did intend to negotiate for a settlement on the basis of Market Street's cross-claim for the overcharges it paid to Byllesby Engineering from 1926 to 1935, irrespective of which company received the benefit of those overcharges (T. R. 739–40). In an affidavit filed by Cogan in March 1948 in the action of Standard Gas against Market Street on the open account, for the purpose of supporting the settlement (P. R. 168–79), he listed the following factors among others which entered into consideration in his settlement negotiations: that Standard Gas had controlled Market Street since 1925; that Byllesby Engineering was a wholly owned subsidiary of Standard Gas; that Standard Gas had caused Market Street to engage Byllesby Engineering; that Market Street had paid Byllesby Engineering for management services between 1926 and 1935 the sum of $1,565,000 (P. R. 176–77); that "certain victory in the full amount off-setting the balance claimed by Standard Gas and Electric Company on its open account could not in any event be assured"; and that "it would appear to serve the best interests of all prior preference stockholders * * * to avoid protracted litigation on the subject" (P. R. 178). Also significant is his statement in the affidavit "that in the event this matter actually came to trial and was not settled and compromised, the sole issue would be whether or not Standard Gas and Electric Company violated a fiduciary duty by causing Market Street Railway Company to pay the manage-

ment fees it did pay to Byllesby Engineering and Management Corporation from *1926 to 1935* * * *" (P. R. 171).[37] [Emphasis supplied.]

Moreover, the very nature of Cogan's opening offers of settlement in his negotiations with Standard Gas shows that he employed Market Street's whole claim for overcharges as a tool in cutting down the claim on the open account. In his initial negotiations with Standard Gas, he demanded that Standard Gas should cancel its entire claim of about $1,100,000, including interest, and at his second meeting with the Standard Gas representatives he offered to agree to a reduction of the open account by $750,000 (T. R. 202, 337). But he computed the amount of Market Street's set-off against Standard Gas from 1930 to 1935 at only $621,900, including interest.[38] The only logical expla-

[37] Standard Gas' action was based on the open account per its own books which open account, as Cogan admits, "purported to run from 1926" (T. R. 433; see also T. R. 1–B; P. R. 139, 165, 166). Thus, Cogan's support of the settlement in that action is somewhat inconsistent with his position that he was settling the open account beginning in 1931 on the books of Market Street, and that the settlement therefore did not affect Market Street's claim against Standard Power for the profits it received prior to 1931 (T. R. 406; see T. R. 721). In any event, it is clear that a claim by way of set-off is not limited to the period covered by the claim first asserted, and, in a technical sense, parties negotiating for a settlement may, if they so intend, release a claim of one of the parties irrespective of who may be liable therefor.

[38] Cogan computed the profit at 40% of the supervision fees paid by Market Street during this period. He believed this percentage figure to be proper in the absence of proof to the contrary (see T. R. 1–S) because the $270,000 turned over to Standard Power amounted to 40 percent of the supervision fees paid by

nation for these offers is that Cogan was negotiating on the basis of a cross-claim not only of $621,900, including interest, covering the period 1930–1935 (as computed by Cogan), but also of $270,000 turned over to Standard Power from 1926 through 1929, with interest of about $355,000, for a total cross-claim of over $1,200,000 (T. R. 525, 727).[39] As Cogan argued in the district court (T. R. 727–28, 729):

> * * * When we started talking settlement with the Standard Gas & Electric Company it was on the basis of all of the overcharges which Standard Gas had made from 1926 to 1935 and that was a million and a half less 40 percent of a million and a half which would run up to $1,200,000, and when Russell Van Kirk and I had our first conference with Standard Gas and Electric Company at the suggestion of Standard Gas, that is, following the one that Van Kirk had alone with Crowley, we asked for the elimination of the entire open account, which in our estimation, would have eliminated any claim or cause of action trying to collect from Standard Power & Light Corporation. The same thing was true when I offered to give Standard $300,000. I would say that that was a fair and

---

Market Street during the earlier period, 1926 through 1929 (T. R. 723–24).

[39] As stated in Cogan's petition on behalf of the Van Kirk Committee, dated March 21, 1947, requesting the Commission to direct an investigation into the validity of the open account: "* * * petitioners claim and allege that if given proper credit for the fraudulent management fees charged against Market Street * * * the amount thereof would serve to offset the entire open account from Standard Gas * * *" (P. R. 125–26).

reasonable settlement on all of the overcharges for all of the time.

When we got to the point when Russell Van Kirk had about a month to live [he died about a month after the settlement which was reached on December 6, 1947] and he was the only active member of the committee, the other two being no more than practically dummies, after the Commission findings in the record without giving them any fee [September 30, 1949], I was in the position where it was desirable to settle the open account with Standard and assert the cause of action which I know existed against Standard Power * * *.

* * * The fact that they [counsel for Standard Gas] thought they were getting rid of an obligation of $1,200,000 for the amount which I was willing to settle the open account for is up to counsel if they did not see fit to protect themselves at the time * * *.

Now, even assuming that the S. E. C. is correct in quoting my testimony and that I indicated * * * an intention to settle for all of the overcharges which Market Street Railway was entitled to collect from anybody or from Standard Gas & Electric Company, I might still have felt at that time that I still had a cause of action in Standard Power & Light.[40]

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[40] In this connection it should be noted that Cogan supported the initial plan which provided for the liquidation and dissolution of Market Street, although no mention was made in the plan of any additional claims by Market Street (see T. R. 605), and that he blamed Paulson's separate negotiations with Standard Gas as "the prime cause for the failure of [his own] negotiations to eliminate the whole or most of the open account" (T. R. 431).

Thus, by objecting to a release of Standard Power, Cogan in effect seeks a double recovery of the profits turned over to Standard Power.

CONCLUSION

The order of the court below in No. 12,716, insofar as it finds that the Commission's disapproval of any provision in the plan for counsel fees for William J. Cogan is not supported by substantial evidence, and remands the proceeding to the Commission for the purpose of approving a reasonable allowance for Cogan although in a lesser amount than would otherwise be payable to him, should be reversed.

The remaining provisions of the order of the court below in No. 12,716, and the order of the court below in No. 12,813 should be affirmed.

Respectfully submitted.

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MAY 1951.

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In the

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

No. 12,716 and No. 12,813

Securities and Exchange Commission,
Appellant,
v.

William J. Cogan,
Appellee,
William J. Cogan and Charles T. Jones,
Appellants,
v.

Securities and Exchange Commission,
Appellee.

William J. Cogan and Charles T. Jones,
Appellants,
v.

Securities and Exchange Commission,
Appellee.

CROSS-APPELLANTS' AND APPELLANTS' OPENING BRIEF

FILED

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 12,716 and No. 12,813

SECURITIES AND EXCHANGE COMMISSION,
Appellant,

v.

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WILLIAM J. COGAN and CHARLES T. JONES,
Appellants,

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WILLIAM J. COGAN and CHARLES T. JONES,
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SECURITIES AND EXCHANGE COMMISSION,
Appellee.

CROSS-APPELLANTS' AND APPELLANTS' OPENING BRIEF

1. Statement of Basis of Jurisdiction

This is an application by the Securities and Exchange Commission to the District Court, Northern District of California, Southern Division, to enforce and carry out a

plan of reorganization, and thereafter a further application to said Court to enforce and carry out "Step One" of an amended plan of reorganization of Market Street Railway Company, a California corporation.

Jurisdiction of the said District Court is had pursuant to the provisions of Section 11(e) and 18(f) of the Public Utility Holding Company Act of 1935, 15 U. S. C. A., Section 79k(e), 79r(f).

The District Court remanded the matter to the Commission for further action in accordance with its opinion.

Upon presentation of the amended plan containing what were designated as Step One and Step Two, the District Court entered its order of enforcement concerning Step One.

Two separate appeals were taken from the order of remand, which was not complied with.

An appeal was taken from the enforcement order.

The appeals herein are founded on Section 128(a) of the Judicial Code, as amended (28 U. S. C. A. Section 225).

2. Counter Statement of the Case

On May 20, 1947 the Securities and Exchange Commission, at the request of Russell M. Van Kirk, et als., a Committee for the Prior Preference Stockholders of Market Street Railway Company and acting on the basis of other facts set forth in a petition and an amended petition filed on their behalf, issued its notice and order for public investigatory proceedings pursuant to Sections 11(a), 18(a) and 18(b) of the Public Utility Holding Company Act of 1935.

The order stated that evidence would be received in the public hearings concerning (*inter alia*) the origin and status of an open account now on Market Street's books in

favor of Standard Gas and Electric Company, which apparently had its origin in certain charges for services made by Public Utility Engineering and Service Company, a service company subsidiary of Standard Gas and Electric Company.

Thereafter public hearings were had and evidence received in the course of said investigation until December 9, 1947 when the investigative proceeding was closed, subject to further call by the Hearing Officer or the Commission.

On January 20, 1947, prior to the issuance of the Commission's notice and order for said public investigatory proceedings, Standard Gas and Electric Company had instituted an action against Market Street Railway Company in the United States District Court for the Northern District of California, Southern Division (Civil Action, File No. 26807-R), based on an alleged open account indebtedness between the companies and seeking judgment for $1,069,063. Market Street Railway Company filed an answer which admitted an indebtedness of $948,439.01.

Subsequent to the issuance of the Commission's notice and order for hearing, and on June 2, 1947, Lea Rosen, a prior preference stockholder of Market Street, sought leave to intervene as a party defendant in the District Court action on behalf of herself and all other prior preference stockholders similarly situated. The Court granted her request. She thereupon filed an answer in intervention which denied that Market Street was indebted to Standard Gas and Electric Company in any amount and as an affirmative defense, averred certain facts in connection with the services performed for Market Street which she contended required subordination of the claim of Standard Gas and Electric Company to that of the prior preference stockholders. Lea Rosen also sought and received the right to intervene in the Commission proceeding.

Standard Gas and Electric Company challenged Commission jurisdiction by motion to dismiss the application of the Van Kirk Committee; to vacate the Commission's order of May 20, 1947 or in the alternative to stay the proceedings before the Commission until disposition of the District Court action and finally it urged that if the motion was denied in all respects that the proceedings be had in San Francisco. After oral argument on July 23, 1947 the Commission denied the motion in all respects, directed the hearing officer to convene the hearing forthwith on July 23, 1947. After receiving into evidence a number of exhibits introduced by the staff of the Commission over the objection of Standard counsel, the hearing officer at the request of Standard adjourned the hearing to August 6, 1947.

On August 1, 1947 the Commission issued its memorandum opinion and order denying the motion in all respects and expressly reaffirming and continuing in effect the provision contained in its order of May 20, 1947 which restrained Market Street Railway Company from making any payments to Standard Gas and Electric Company "without prejudice to the right of Standard or Market Street to request approval of any specific proposal respecting payments."

Standard Gas and Electric Company then filed in the United States Circuit Court of Appeals for the Third Circuit a petition under Section 24(a) of the Public Utility Act of 1935 to "review an order of the Securities and Exchange Commission, dated July 23, 1947" (actually only oral). A stay of the proceedings and of the Commission orders of May 20, 1947 and July 23, 1947 was also sought, based on alleged lack of jurisdiction because of the existence of the District Court action. The motion was denied and the stay refused.

The Commission had argued to the Court that it is certainly warranted in investigating to determine whether or

not it should take action with respect to an intercompany claim disputed by public security holders but substantially conceded by the alleged debtor company.

The Commission opinion dated August 1, 1947 pointed out that the scope of the issues involved in its inquiry is not necessarily co-extensive with those presented in the pending litigation; that in certain respects the Commission proceeding may be regarded as antedating in point of time the court proceedings; and that the specific challenge to the intercompany claim urged upon the Commission on behalf of public security holders of Market Street, and the issuance of the Commission's order for investigation thereon, antedated any substantial adversary litigation in the District Court.

The Commission memorandum to the Circuit Court in substantiating the above statement said: Thus at the time of the order for investigation Market Street had admitted over 90% of the amount of the claim and it was only after the Commission's investigation had commenced that Lea Rosen intervened in the District Court proceedings for the purpose of defending against the balance of the claim.

As above mentioned the investigative proceeding terminated on December 9, 1947 at which time counsel for Standard Gas and Electric Company announced on the record of the Securities and Exchange Commission that a settlement had been reached which included the statement:

> "Standard will accept $550,000 as full liquidation of the open account carried on the books of Market Street."

In January, 1948 Standard Gas and Electric Company and Market Street Railway Company joined in a petition to the Securities and Exchange Commission requesting that the Commission vacate its order enjoining payments

by Market Street to Standard Gas and Electric Company and permit the settlement of the action in the District Court. No action was taken by the Commission on that petition.

A petition executed by Standard Gas and Electric Company and Market Street Railway Company was submitted to the District Court in March 1948. Both said petitions contained the following language:

> "Standard and its counsel discussed with Members of the Van Kirk Committee and with its counsel and with counsel for Rosen a settlement of Standard's claims against Market Street and a dismissal of the other trial of the proceedings pending before this Court and before that Commission to the end that the open account indebtedness of Market Street to Standard might be discharged. As a result of such discussions Standard has arrived at a settlement agreement with Market Street and the Van Kirk Committee subject to the approval of this Court and the Securities and Exchange Commission as First: That Market Street pay to Standard and Standard accept from Market Street the sum of $550,000 in full payment of the open account indebtedness of Market Street to Standard."

The Court considered the application on March 15, 1948 together with a motion made by counsel for Lea Rosen to refer the matter to a Master to consider whether or not the proposed settlement was adequate.

After counsel for the Securities and Exchange Commission told the Court the Commission had no preference in the matter and was entirely satisfied to have the Court dispose of the matter he told the Court that the Commission could take jurisdiction and itself dispose of the matter. It was then referred back to the Commission.

The Commission then indicated to Standard Gas and Electric Company that it wished a plan to be filed by or on behalf of Market Street Railway Company pursuant to the provisions of Section 11 (e) of the Public Utility Holding Company Act of 1935 requesting the approval of the Commission of a plan of recapitalization of the Company, for the alleged purpose of enabling said Company to comply with the provisions of Section 11 (b) of the Act.

Such a plan was filed with the Commission on or about April 22, 1948.

Hearings were had on the said plan which primarily involved no more than the settlement arrangement, and the order which directed the hearing consolidated the record of the investigation which had been had and the record which was to be made on the question whether the plan was fair and equitable and conformed with the standards of the Act. The said hearing was held in July, 1948 and oral argument was had before the Commission on November 30, 1948 and the Commission issued its Findings and Opinion on September 30, 1949.

The Commission then denied a reargument which had been requested by William J. Cogan by telegram of October 3, 1949, followed by letter and memorandum of October 10, 1949.

An action was started in the United States District Court District of New Jersey on October 14, 1949 by Charles T. Jones (a prior preference stockholder of Market Street Railway Company since 1923) and in the name of the Van Kirk Committee on behalf of Market Street and against Standard Power and Light Corporation to recover $270,000 with interest from 1926-1929 on said sum to date and the Commission was informed by letter dated October 21, 1949 of such action.

The theory of the action was that Standard Power and Light Corporation was the immediate owner of 39.67% of the voting stock of Market Street and in control; that during 1926, 1927, 1928 and 1929 it violated a fiduciary duty by receiving from a management company the profits resulting from management services.

The open account on the books of Market Street with Standard Gas and Electric Company started in 1931; Standard Gas and Electric Company became the immediate owner of the aforesaid 39.67% of the voting stock of Market Street by transfer from Standard Power and Light Corporation on January 7, 1930 and between 1930 and 1935 it was Standard Gas and Electric Company which received the profits resulting from management services charged to Market Street Railway Company.

By its opinion of September 30, 1949 the Commission stated it could find the total amount of the proposed settlement to be fair and equitable to all concerned provided compensation to Cogan was eliminated with such sum reducing the payment to be made to Standard Gas and Electric Company from $550,000 to $512,500 (the net amount it was to receive under the plan as presented); also with the Van Kirk Estate to receive $7,500 instead of the $25,000 provided by the plan; also with an allowance of $5,000 to be payable to Milton Paulson and his associates.

Following the notification sent the Commission on October 21, 1949 a conference was had between two staff members and Messrs. Hansen and Appel, the latter two being respectively counsel for Standard Gas and Electric Company and Market Street Railway Company, on ways and means to dispose of the New Jersey action against Standard Power and Light Corporation. It was decided at said conference that in preparing the amended plan in apparent compliance with the Commission opinion of Septem-

ber 30, 1949 reference should be made to the existence of the action against Standard Power and Light Corporation. It was also decided to include a provision to give a release to Standard Gas and Electric Company AND ITS SUBSIDIARIES, which would eliminate Standard Power and Light Corporation since during 1926-1929 that was its status.

An amended plan was filed by Market Street Railway Company on December 14, 1949 with the above changes.

On January 6, 1950 the Commission issued an order to show cause why the amended plan should not be approved. The order was made returnable on January 16, 1950.

Apparently the Commission was not aware that the amended plan was providing for a release of the subsidiaries, since among other recitals in its order to show cause it sets forth that Market Street had filed its amended plan "in accordance with the aforesaid findings and opinion of the Commission".

A copy of the amended plan dated December 8, 1949 and filed as aforesaid on December 14, 1949 was not mailed to William J. Cogan until some time in January, 1950 and then only after written request to Samuel Kahn.

On the return day of the said order to show cause January 16, 1950 Murray Taylor, Attorney for Standard Power and Light Corporation appeared and expressed his interest in securing the "release" and several others interested in railroading the proceeding were present or sent communications, the staff wanted agreements placed in the record which had not been previously offered and at the same time took the position that the hearing was only a show cause for argument from which the Commission could conclude whether or not to have an open hearing. William J. Cogan stated in detail the errors of omission and commission included in the Commission opinion of September 30, 1949 and under oath reaffirmed them,

while Cyril Appel, counsel for Market Street under oath stated he had been requested by Helmer Hansen, Counsel for Standard Gas and Electric Company to add the provision for the release of subsidiaries. There was no contradiction of this testimony and none has been had since that date.

On March 9, 1950 the Commission made its supplemental findings. Its only acknowledgment of the extensive analysis and criticism of its initial Findings (included in R. 386-477), as made on January 16, 1950, is to beg the question by referring to its manner of disposition of the issues involved in one of the North American Company (Holding Company) cases. By no stretch of the imagination can this case be considered as similar to the instant case and the issues involved are in no way analogous.

The Opinion of March 9, 1950 suggested as desirable, an amendment to the Plan to provide for "Release" of Standard Power and Light Corporation, and Market Street Railway Company was invited or requested to so amend its Plan.

On April 6, 1950 the Commission was informed by Samuel Kahn, President of Market Street Railway Company and its principal executive officer since 1926, that the Board of Directors of Market Street carefully considered the Supplemental Findings and Opinion of the Commission dated March 9, 1950 and unanimously adopted a Resolution not approving the proposed amendment to the Amended Plan for liquidation and dissolution of Market Street Railway Company.

On April 18, 1950 the Commission made an order which quoted the resolution of the Board of Directors of Market Street not to amend the Amended Plan and which sets forth that at the request of Graham-Newman Corpora-

tion, a prior preference stockholder of Market Street Railway Company, with 10,000 shares (of which 5,500 shares were bought after the investigatory proceeding was started)—(Note added), the time within which the said amendment to the amended plan might be filed was extended to May 15, 1950 so as to permit the reconsideration by the Board of Directors of Market Street, after the annual meeting of said Company scheduled to be held on April 26, 1950.

The Commission authorized Graham-Newman Corporation to solicit proxies from the larger stockholders (whom, parenthetically, likewise had acquired the whole or the major portion of their shares after the proceedings started), and at said annual meeting of stockholders three Graham-Newman representatives and two Standard Gas and Electric Company representatives were elected as Directors and the old board was superseded.

The new Board motivated by the personal interest (R. 573) voted an amendment to the amended plan to provide for a "Release" to Standard Power and Light Corporation and filed such amended plan forthwith, and the Commission approved said Plan as amended, by its order dated May 3, 1950 and on the same date the Commission instituted a proceeding in the District Court of the United States Northern District of California, Southern Division, Civil action, File No. 29723 and requested an enforcement order pursuant to Sections 11(e) and 18(f) of the Public Utility Holding Company Act of 1935.

A hearing was held before the Honorable Louis E. Goodman, District Judge, on July 6th and 7th, 1950.

By order dated July 11, 1950, the District Court found that the plan was fair and equitable and appropriate to effectuate the provisions of Section 11 of the Public Utility Holding Company Act of 1935, except that the Commis-

sion's disapproval of a fee for William J. Cogan was not supported by substantial evidence and the proceeding was remanded to the Commission for the purpose of fixing an allowance to William J. Cogan and for reconsideration of the allowance provided in said plan for Wilton Paulson and his associates.

On August 7, 1950 the Commission filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit, appealing from those portions of the said order dated July 11, 1950 which found that the Commission's disapproval of a fee for William J. Cogan was not supported by substantial evidence and that the Amended Plan, insofar as it failed to provide for such fee, was not fair and equitable and appropriate to effectuate the provisions of Section 11 of the Act and which remanded the proceeding to the Commission.

On September 7, 1950 William J. Cogan filed a notice of appeal, appealing from the whole of the said order dated July 11, 1950 save and except that part which found that the Commission's disapproval of a fee for William J. Cogan was not supported by substantial evidence and that the Amended Plan, insofar as it failed to provide for such fee, was not fair and equitable and appropriate to effectuate the provisions of Section 11 of the Act and which remanded the proceeding to the Commission for the purpose of fixing an allowance to William J. Cogan.

On September 15, 1950 Charles T. Jones, a holder and owner of ten shares of prior preference capital stock of Market Street Railway Company since December, 1923 filed a notice of appeal from the same part of the order of July 11, 1950, as theretofore appealed from by William J. Cogan.

On September 1, 1950 the new management of Market Street Railway Company filed a Modified Amended Plan

with the Commission, the essence of which provided for the completion of the settlement with Standard Gas and Electric Company, arranged as aforesaid and to include the exchange of "Releases". Distribution of some cash to prior preference stockholders of Market Street was part of the plan's Step One. Step Two contemplated the legal fees and dissolution.

The Commission held a hearing on the Modified Amended Plan on September 29, 1950, at which no testimony was offered or taken.

On October 24, 1950 the Commission issued its Second Supplemental Findings and Opinion and approved the Modified Plan, concluded it was not inconsistent with the Opinion of the District Court issued July 7, 1950 and found it necessary to effectuate the provisions of Section 11 of the Act and fair and equitable to all persons effected. It applied on October 24, 1950 to the District Court to enforce and carry out the terms and provisions of Step One of the said Plan.

On November 21, 1950 the District Court held a hearing and entered its order of enforcement.

Both the Commission and the District Court denied application to stay the enforcement pending adjudication on the appeals from the District Court order dated July 11, 1950. The cost of a bond would be prohibitive since loss of interest would amount to $2.500 per month. Accordingly none could be tendered by either William J. Cogan or Charles T. Jones.

William J. Cogan and Charles T. Jones have duly appealed from the order of the District Court dated November 21, 1950.

The Court of Appeals for the Ninth Circuit has permitted consolidation of the appeals herein.

3. Questions Involved and Specifications of Errors

The questions presented by the appeals herein are:

A. Whether the Commission and in turn the District Court complied with statutory standards in finding the Plan of reorganization as Modified and submitted, to be fair and equitable to the persons involved.

B. Whether the Findings of Fact and the conclusions of law embodied in the Initial Findings, the Supplemental Findings and the Second Supplemental Findings made by the Commission and accepted by the District Court are supported by substantial evidence and were arrived at in accordance with legal standards.

C. Whether the Commission actually asserted any jurisdiction over the cause of action asserted by or on behalf of Market Street Railway Company against Standard Power and Light Corporation in the United States District Court for the District of New Jersey, and if so, whether the Commission thereafter had any adequate hearing thereon.

Charles T. Jones and William J. Cogan state the following as their specification of errors:

Specification of Errors

The United States District Court for the Northern District of California, Southern Division, erred:

The District Court erred in finding that the Findings of Fact and Conclusions of Law embodied in the Findings and Opinion of the Securities and Exchange Commission dated September 30, 1949, its Supplemental Findings and Opinion dated March 9, 1950 and its Order dated May 3, 1950, copies of which are attached to the Commission's

Application in the proceedings herein dated May 3, 1950, as Exhibits G, J and M respectively, are supported by substantial evidence and were arrived at in accordance with legal standards.

The District Court erred in finding that the Amended Plan for Liquidation and Dissolution of Market Street Railway Company, as modified, is fair and equitable and appropriate to effectuate the provisions of § 11 of the Public Utilities Holding Company Act of 1935.

The District Court erred in not finding that the Objections to said Amended Plan for Liquidation and Dissolution of Market Street Railway Company, as modified, were entirely justified and supported by the record of the hearings before the Securities and Exchange Commission.

The District Court erred in not finding that the Securities and Exchange Commission failed, neglected and refused to have a proper hearing, or any hearing whatsoever, on the subject matter of the action brought by Charles T. Jones on behalf of Market Street Railway Company against Standard Power and Light Corporation in the United States District Court, in and for the District of New Jersey.

The District Court erred in failing to appraise the fairness of the settlement arrived at between Standard Gas and Electric Company and Market Street Railway Company on or about December 6, 1950 in the action entitled *Standard Gas and Electric Company* v. *Market Street Railway Company* civil action No. 26807 filed in the District Court for the Northern District of California, Southern Division, in accordance with the laws of the State of California, apart from the Amended Plan for dissolution of Market Street Railway Company submitted by the Securities and Exchange Commission.

The District Court erred in authorizing and directing release to Standard Gas and Electric Company and to

Standard Power and Light Corporation, or either of them, and in not finding that such release or releases were not within the contemplation of the parties thereto.

The District Court erred in not finding that the Securities and Exchange Commission did not hold fair, impartial or adequate hearings, as shown by and claimed in the objections filed in the aforesaid United States District Court by Charles T. Jones and William J. Cogan.

The District Court erred in not finding that the Securities and Exchange Commission failed, neglected and refused to have a proper hearing, or any hearing whatsoever, on the subject matter of a release to Standard Power and Light Corporation, and that said Securities and Exchange Commission was therefore without jurisdiction to direct Market Street Railway Company to give a release to Standard Power and Light Corporation.

The District Court erred in basing the whole or any part of its order of approval and enforcement of the modified amended plan on findings made in its order of July 11, 1950 in that said findings, and each of them, were themselves in error and not supported by substantial evidence and were not arrived at in accordance with legal standards.

The District Court erred in finding that the findings of fact and conclusions of law embodied in the second supplemental findings and opinion and order of the Commission dated October 24, 1950 are supported by substantial evidence and were arrived at in accordance with legal standards.

The District Court erred in finding the modified amended plan is fair and equitable and appropriate to effectuate the provisions of § 11 of the Public Utilities Holding Company Act of 1935.

The District Court erred in authorizing Market Street Railway Company to carry into effect the steps and trans-

actions provided for in step one of the modified plan, and in connection therewith, to specifically authorize payment of $512,500 by Market Street Railway Company to Standard Gas and Electric Company and concurrently therewith to deliver to Standard Gas and Electric Company a full and complete release and discharge of any and all liability, past or present, of Standard Gas and Electric Company and its subsidiaries, including Standard Power and Light Corporation, to Market Street Railway Company for any cause whatsoever.

4. Summary of Argument

(a) The proceeding which developed all of the evidentiary facts was purely and entirely an investigatory one, upon the basis of which the Commission could either require a reorganization proceeding under Section 11(b)(2) of the Public Utility Holding Company Act, or could agree to consider a plan of reorganization submitted voluntarily pursuant to Section 11(b)(1) of the Act, or if it saw fit, need do nothing.

(b) Since the investigation called for information concerning all business transactions between Market Street Railway Company and Standard Gas and Electric Company and Byllesby Engineering and Management Corporation, and accordingly produced information that the first transaction was had in 1925, there is no justification for any conclusion that all later proceedings must embrace the full period of 1925 to 1935.

(c) The findings of fact made by the Commission on September 30, 1949 show that it did not intend to include anything prior to 1931, even though it made reference to overcharges which were present from 1926 to 1930.

(d) In finding the settlement to be "fair to all concerned", it clearly reflected the decision of the Commission not to go back of the year 1931.

(e) The remarks of William J. Cogan, upon which the Commission predicates its denials of a fee, were, at the most, only injudicious, and the record is devoid of proof of dereliction of duty in any manner or to any degree.

(f) There is no justification for the criticism of Cogan set forth in the initial finding of the Commission and in the supplemental findings of the Commission, and the inferences sought to be drawn by the Commission from anything said by Cogan are not warranted, and the record conclusively shows that at all times the sole interest of Cogan was to protect and develop and assert the rights of the Prior Preference Stockholders of Market Street Railway Company and the rights of that Company.

(g) In its findings of September 30, 1949, the Commission sets forth that it made an independent examination of the record, and based upon that, concluded that the settlement (with the minor changes it called for) was *"fair to all concerned."* It cannot support this as a proper finding, in view of the rejection by it in later findings of the claim against Standard Power and Light Corporation.

(h) In its findings of September 30, 1949, the Commission found that throughout the period of 1926 to 1935, Market Street Railway Company was *"greatly overcharged"*, and at another point in its opinion found that during said period Market Street Railway Company was *"grossly overcharged."* Such finding demonstrates the error in the Commission's conclusions that the claim against Standard Power and Light Corporation should be included in the settlement made.

(i) The Commission in its findings of September 30, 1949 indicated that most of the persons familiar with the facts were now dead, or have no recollection of the transactions had from 1925 to 1935. This is demonstrably untrue, since the opinion itself shows that Samuel Kahn was *the* representative of the Byllesby interests from 1925

to 1935, and the record shows that Bernard F. Braheney was the auditor for the Byllesby interests during the same period and that George Knourek, one of the principal witnesses in the record, was assistant to Braheney during the same period.

(j) The staff of the Commission announced on the record that it took no position in the matter, which has not proven to be correct, since Messrs. Auerbach, Morris and Isaacs, of the staff had a conference with Helmer Hansen, counsel for Standard Gas and Electric Company, and Cyril Appell, general counsel of Market Street Railway Company, in October 1949, shortly after the Commission was informed by letter from William J. Cogan, dated October 21, 1949, that an action was started in behalf of Market Street Railway Company against Standard Power & Light Corporation in the United States District Court, for the District of New Jersey, to collect $270,000 with interest thereon, increasing the claim to $625,000 by reason of the participation by Standard Power & Light Corporation in profits during 1926 to 1929 from management fees paid by Market Street Railway Company and for which the Standard Power & Light Corporation gave no consideration. Interlocking directorates existed at the time, and Standard Power & Light Corporation directly controlled Market Street Railway Company at the time.

(k) Members of the staff of the Commission improperly participated in a conference which resulted in a decision whereby Market Street Railway Company would amend its plan of reorganization by including a provision to give a release to Standard Gas and Electric Company AND ITS SUBSIDIARIES in an attempt to dispose of an action then under way in a Federal Court.

(l) William J. Cogan informed the Commission by letter dated October 21, 1949 that an action was started on October 14, 1949 in the United States District Court for the District of New Jersey against Standard Power and

Light Corporation on behalf of Market Street Railway Company, and stated therein the basis for such action. No hearing of any kind or nature was had at any time by the Commission concerning the existence or validity of this action, and the Commission acted in an arbitrary and capricious manner and contrary to its duty in the premises by its failure to hold said hearing.

(m) The Commission, contrary to its duty in the premises, and without a hearing thereon, arranged with, and accepted from, a small group of Prior Preference Stockholders of Market Street Railway Company, (who had acquired most of their stock after the Commission started its investigation), a plan of reorganization which was submitted to the Commission within a few days after a new board of directors for Market Street took office on April 28, 1950, and which provided for a general release to include a release in favor of Standard Power & Light Corporation. This followed a refusal by the old board of directors to submit to the Commission a plan containing such provision.

(n) The Commission was not warranted in making a supplemental finding that it treated the plan as one which was offered to settle all controversies between Market Street and Standard Gas and its subsidiaries, past and present, including Standard Power, as a step in the final winding up and dissolution of Market Street.

It quotes a North American Light & Power Co., et al. case, 170 F. 2nd 924, as support of its action, as presenting the same kind of issues. The two may seem alike in form, at least to the Staff, but are far apart in substance. Complex issues there, are simple here. One class of stock is solely interested in the instant case. It has long been known that no equity exists for any class of stock other than the Prior Preference. Simple arithmetic is sufficient for the Market Street Railway Company case.

5. Dissension Between Standard Gas & Electric Company and Standard Power and Light Corporation

This Court is requested to take judicial notice of an order of Securities and Exchange Commission, dated November 13, 1947, entitled, "In the Matter of Standard Power and Light Corporation, Standard Gas and Electric Company and Subsidiary Companies thereof (File No. 59-9) and In the Matter of Standard Gas and Electric Company (File Nos. 54-72 and 59-66)," and including the statement therein at page 4 thereof;

> "The recent dissension that has manifested itself in the management of Standard Gas and Standard Power has had a direct bearing upon the nature of the steps which have been, and which are to be, taken in effecting compliance with Section 11."

The Court is further requested to take judicial notice of Holding Company Act Releases Nos. 7811 and 7830, in the Matter of Standard Power and Light Corporation respectively dated October 30, 1947 and November 7, 1947, referred to in said Order of November 13, 1947.

The presence of the dissension proven to exist by the above described release and statement of the Securities and Exchange Commission offers an excellent reason why the executives of, and the attorneys for, Standard Gas & Electric Company would have no interest in helping to dispose of a claim against Standard Power & Light Corporation at any time during 1947.

6. References to Exhibits Printed in Appendix

There are printed in the Appendix hereto letters exchanged between Samuel Kahn and different executives of the Standard System, which will serve to show the inception of the arrangements for compensation for man-

agement services, and the method by which they were arbitrarily charged from year to year. Such letters also show the manner in which the board of directors of Market Street Railway Company was selected and the fact that it was under the domination and control of the Byllesby interests.

There are also printed in the Appendix the full content of several contracts made between the different companies showing the connection of Ladenburg, Thalmann & Company initially and the proof that Standard Power & Light Corporation was entitled to, and received, the profit from management fees paid by Market Street Railway Company.

There are also printed in the Appendix six letters and a telegram representing an exchange of communications between William J. Cogan and representatives of Standard Gas & Electric Company during the period from October 29, 1947 to December 8, 1947. These letters, without further proof in the matter, would indicate that William J. Cogan was attempting to serve the best interests of the Prior Preference stockholders of Market Street Railway Company at all times.

POINT I

The record does not support the stated basis for Commission's Action in passing upon the Standard Gas and Electric Company—Market Street Railway Company settlement.

The Commission, in its opinion of March 9, 1950, (R. 93, 94) states:

> "In summary, therefore, whether or not Cogan intended in his negotiations with Standard Gas to settle all claims which Market Street might have against Standard Gas and its subsidiaries, past and present, we treated the Plan as one which was offered to re-

solve all controversies between Market Street and Standard Gas and its subsidiaries, past and present, including Standard Power, as a step in the final winding up and dissolution of Market Street; and it was on such basis that we found the payment of $512,500 to be fair and equitable."

"Accordingly, we believe the Plan should now be amended to provide clearly for a complete release of Standard Gas and its subsidiaries, including Standard Power."

The Commission contends that its approach in the instant case is the same, and was based upon its approach, in the *Matter of North American Light & Power Company, the North American Company, et al., Jane Scattergood, et als.*, appellants, reported in 74 Fed. Supp. 317 (D. Del. 1947), affirmed in 170 F. 2d, 924 (C. C. A. 3-1948).

The two cases are essentially different and the handling of the one could under no circumstances be a criterion for the handling of the other. It should be borne in mind that prior to the investigatory proceeding herein, and necessarily prior to the submission of a plan of reorganization, the Commission on August 8, 1941, had directed Standard Gas and Electric Company to sever its relationship with a variety of companies, including specifically Market Street Railway Company, by disposing of its direct or indirect ownership and control of their securities, (See 12 S. E. C. 650); that in 1943, Standard Gas and Electric Company found a purchaser for its shares of stock of Market Street Railway Company and its open account, and was authorized to sell those assets but did not do so. (See 16 S. E. C. 85).

Certainly, the Commission knew on or before December 9, 1947, which was the date its investigatory proceeding, for all practical purposes, terminated;—that the shares of stock of Market Street Railway Company owned by

Standard Gas and Electric Company were of no value, in cash, even though they represented voting control of Market Street Railway Company. It also knew that after Market Street Railway Company sold its operating properties in 1944, there could, under no conditions, be assets available for distribution to any class of stock except the Prior Preferred Stock. It further knew that any sums of money recovered on behalf of Market Street Railway Company, or saved by it in connection with claims against former controlling companies, would inure to the benefit of the Company, and in turn the Prior Preference Stockholders.

By contrast, the North American Light & Power case referred to had complex and controverted claims which had involved, in the first instance, claims by another subsidiary against Light and Power and which, in this case, was the subject of controversy concerning inter-corporate liability for the amount of a settlement Light & Power made with a sub-subsidiary, the aggregate of which would necessarily affect the shareholdings and the value of distributions to be made to a variety of classes of stockholders in the System. While justification may exist, based upon the complexity of the issues involved, in the Light and Power case, we have the simple proposition in the Market Street Railway Company case, that except for the accident of circumstance, Market Street Railway Company would not even be a member of a holding company system, and the issues involved are simplicity itself, consisting only of the damages it is entitled to recover against former parent companies for distribution to one class of stockholders after the creditors are paid.

An important variance between the two cases is that the Court, in its opinion in the Light & Power case, among other things, stated:

> "It may be noted too that the Commission did not require North America to comply with its suggestion,

and had the latter desired to stand or fall upon the original plan, it could have done so."

In the Market Street Railway Company case, the Board of Directors, headed by Samuel Kahn, who had been president and director since 1926, when invited by the Commission to amend its plan so as to release Standard Power & Light Corporation, refused to do so, on advice of its then general counsel, Cyril Appell, who was of opinion that Market Street Railway Company, by its stockholders, had a good cause of action against Standard Power & Light Corporation, then at issue in the United States District Court, District of New Jersey. This should have been accepted by the Commission, as a decision to stand or fall upon the said plan without further amendment. The later amendment represented action by a board of directors who were not interested in the minority stockholders and voted such amendment merely for the purpose of facilitating the disposition of the assets of Market Street Railway Company to the advantage of a small group of stockholders who had acquired most of their stock after the investigatory proceeding had started and held their stock only for speculative purposes, so that it was within the knowledge of the Commission—or it should have been within their knowledge—that such was the fact. In any event, no hearing was had to learn what facts did exist concerning the possibility that a new board of directors would be composed of disinterested persons holding office for the purpose of representing the minority stockholders as well as the majority stockholders.

It is noteworthy that Mr. Douglass Newman stated at (R. 573):

> "The point is we are accused, and we admit our guilt; we have a personal interest in this, and we want to get our money."

POINT II

Arguments of counsel cannot supply lack of findings.

The question of the extent of the terms of settlement, in so far as written evidence is concerned or sworn evidence, includes the following cogent facts: The settlement was announced by Counsel of Standard Gas & Electric Company on December 9, 1947 as a settlement of the open account (which started in September 1931). In January 1948, a petition signed by both Standard Gas & Electric Company and Market Street Railway Company requested permission to settle the open account and made no reference to a release. In March 1948, a petition signed by both said companies was presented to the District Court, and that also contained no reference to a general release. Commission Exhibit 106 in this proceeding is a transcript of the open account on the books of Market Street Railway Company, and that shows the opening entry to be September 1931. The record is void of any sworn statement anywhere that it was intended to release Standard Power & Light Corporation from any obligation it owed Market Street Railway Company; and the only reference to a release is contained in a plan of reorganization submitted to the Commission in April of 1948, which likewise merely mentioned settlement of the open account but which provided for the execution and delivery of a release to the Standard Gas & Electric Company. The record does not show or contend that the release was to cover a period other than the period of the open account, to wit, 1930-1935.

There is a complete lack of evidence to support the findings of the Commission made in 1950, and based upon the existence of the suit against Standard Power & Light Corporation in New Jersey, that Cogan intended to release Standard Power & Light Corporation.

The only statement in the record that Standard Gas and Electric Company intended or expected to receive a release is represented by oral statements on the record by Helmar Hansen, counsel, not that any release was promised, not that he had been told that the settlement covers the years 1926-1930, but that he naturally expected to receive a release.

The Supreme Court rejected an effort to substitute arguments of counsel for the lack of findings of an administrative agency, as held in the case of *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80:

> "But the difficulty remains that the considerations urged here in support of the Commission's order were not those upon which its action was based."

The foregoing rule that administrative action is legally valid only if it is based on findings has been consistently applied by the Supreme Court:

Jacob Siegel Co. v. *Federal Trade Commission,* 327 U. S. 608;
Ashbacker Radio Corp. v. *Federal Communications Commission,* 326 U. S. 327, 333;
Colorado-Wyoming Gas Co. v. *Federal Power Commission,* 324 U. S. 626, 634;
Eastern-Central Ass'n v. *United States,* 321 U. S. 194, 208-12;
Securities and Exchange Commission v. *Chenery Corp.,* 318 U. S. 80, 92-94, 332 U. S. 194, 196-97;
United States v. *Carolina Freight Carriers Corp.,* 315 U. S. 475, 488-89;
Phelps Dodge Corp. v. *National Labor Relations Board,* 313 U. S. 177, 196-97;
National Labor Relations Board v. *Fansteel Corp.,* 306 U. S. 240, 261;
Thomas Paper Stock v. *Porter,* 328 U. S. 50, 53;

Yonkers v. *United States,* 20 U. S. 685, 691-92;
United States v. *Chicago, M., St. P. & P. R. R.,* 294 U. S. 499, 510-11;
United States v. *Baltimore & Ohio R. R.,* 293 U. S. 454, 463-65;
Panama Refining Co. v. *Ryan,* 293 U. S. 388, 431-33.

It is, therefore, contended that the record shows, from the proof contained therein, that the settlement between Standard Gas & Electric Company and Market Street Railway Company was intended merely to cover the open account from 1931 to 1947, and the offsets against said account for the same years; and that the decision of the Commission to the contrary is arbitrary and capricious; and that the decision of the District Court, in the absence of examination of the record, is also arbitrary and capricious.

POINT III

Jurisdictional considerations.

In considering the status and sometimes the plight of the minority stockholder, it must be borne in mind that the Securities and Exchange Commission is under no legal compulsion to assert the existence of equitable rights and to act as the champion of minorities.

Leahy, District Judge, U. S. D. C. Delaware stated in an opinion dated April 29, 1944, Civil Action No. 229, entitled *Cora Homewood, Tillie M. Brown and John H. McLaughlin, Plaintiffs, against Standard Power and Light Corporation, et al.,*

> "It is not the function of the Commission to insist that the plaintiffs here, or any other stockholder, appear before it and tell of their grievances. The fact that the plaintiffs have not gone to the Commission is not without its significance. Where a party

does not seek to enlist the protective sanctions of the SEC, or at least warn that agency by formal charges that potential equities lurk behind a submitted plan of a utility, in favor of a particular group, a court should hesitate to proceed with litigation against companies which are under the jurisdiction of the Commission."

The Commission itself, in the course of authorizing Standard Gas and Electric Company to sell its interest in Market Street Railway Company observed *one* overcharge for management fees in the sum of $86,370.90 and even made a footnote that interest thereon at 6% would amount to $54,393.03 but made no finding that Market Street would thereby be entitled to a set-off against the account for any amount (December 15, 1943—14 S. E. C. 966).

Similarly, in the course of its Opinion dated May 29, 1944 in the *Matter of Standard Gas and Electric Company* 16 S. E. C. 85 the Commission said:

> "When specific proposals for the sale or distribution of Standard's holdings of the stocks of its subsidiaries are presented to us, we shall consider what requirements ought to be imposed, with regard to such matters as management contracts with the Service Company of the Standard System, and the election of independent directors, in order to insure actual divestment of control of the subsidiaries by Standard in compliance with our Section 11(b)(1) order."

It might properly be argued, on behalf of cross-appellants in this matter, that in accordance with the decision of Judge Leahy, of Delaware, United States Court, on April 29, 1944, as aforesaid, the S. E. C. was actually warned that a suit was under way in another jurisdiction and complete information given the Commission in con-

nection therewith. This was before the Commission made any order stating that a plan of reorganization for Market Street Railway Company was fair and equitable; nevertheless, the Commission did not see fit to have any hearing on the subject of the suit in the United States District Court, District of New Jersey, against Standard Power & Light Corporation. At the very least, the Commission owed the Market Street Railway stockholders the duty of considering the relative equities and the relative claims to the end that the interests of the minority stockholders would be protected. Its opinion in 16 S. E. C. 85 promised that when, as and if a plan of reorganization of Market Street Railway Company was before it, they would consider the election of independent directors. While actual control may have passed, the record fails to show that Market Street Railway Company now has independent directors. It actually shows that Market Street Railway Company now has directors seeking to serve their personal interests.

POINT IV

Attempted justification.

The Commission, in the course of its opinions, has stated alleged justification for its various findings, which analysis indicate to be unrealistic and in many instances not supported by the record. To exemplify this point, this Court could, if it wished, take judicial notice of a variety of opinions issued by the Securities and Exchange Commission since 1940 with reference to the various companies comprising what has been described as the Standard System. These opinions show a company called "The Byllesby Corporation" as the top company and show H. M. Byllesby & Company as the second top company. They indicate that approximately seven (7) individuals, comprising executives of the Standard System, owned the voting stock

of the Byllesby Corporation, which in turn owned the majority of the voting stock of H. M. Byllesby & Company. They show, up to 1930, H. M. Byllesby & Company controlled Standard Power and Light Corporation, together with Ladenburg, Thalmann & Company, which owned half the voting stock. They further show that Standard Gas & Electric Company owned the majority of the voting stock of Standard Power & Light Corporation for a few years prior to the end of 1929, and that on January 7, 1930, through an exchange of securities, Standard Power & Light Corporation became the owner of a majority of the voting stock of Standard Gas & Electric Company.

The Securities and Exchange Commission had a proceeding before it in 1939, wherein the former Byllesby Engineering and Management Corporation sought leave to render management service to companies in the Standard System at cost. In that proceeding, the Commission made some findings that in years prior to the functioning of the Public Utility Holding Company Act, companies in the Standard System had been overcharged; but there was no indication of any desire on the part of the Commission to assist any company of the Standard System in recovering any money paid for overcharges of management.

The foregoing background is presented for consideration by this Court solely for the purpose of showing that the Commission was fully cognizant of the custom of overcharging by the Byllesby Engineering and Management Corporation, which was owned entirely by Standard Gas & Electric Company.

The custom was so general that Senator Norris, in a lengthy article printed in the Congressional Record in 1935, in support of the new legislation, gave the Standard System the prominence of two charts, one for the main system and one for Louisville Gas & Electric Co. and its subsidiaries, to show the extent of the public utility empires which then existed.

The findings made initially by the Commission in the Market Street Railway Company case mentioned the money which Market Street Railway Company paid for management services from 1926 to 1935, and made a second finding showing that Standard Power & Light Corporation had received a total of $270,000 for the years 1926, 1927, 1928 and 1929. The phraseology is such that the money paid to Standard Power & Light Corporation is set forth merely to support the previous finding, that Market Street Railway Company had been greatly overcharged for management fees. Unrealistic findings were also set forth in said opinion, one being that most of the people familiar with the transactions were now dead, a statement which was disproved on its own record in this matter; one with reference to the time element, which can hardly be justified, since almost two years passed during which the Commission was considering the simple question, whether or not $550,000 less charges was sufficient to pay Standard Gas & Electric Company in settlement of its suit for $1,069,000. It was only when the matter reached the stage of disposing of the Standard Power & Light Corporation, New Jersey action, through medium of granting it a release in this action, that time became valuable. As an instance, the Commission permitted a proxy to be sent to stockholders owning upwards of 500 shares of Market Street Railway Company less than one week before April 26th, 1950, by a stockholder for the election of a board of directors which would look more kindly upon the suggestion of the Commission, that the plan be amended to provide for a release of Standard Power & Light Corporation. The Commission had no reason to consider that any complex issues existed, since the hearing on the plan lasted only two days, most of which was devoted to examination by Mr. Milton Paulson in an attempt to qualify himself for substantial fees. It may safely be said that such part of the record, which was addressed only to the plan of reorganization originally submitted required no more than two hours to present.

As part of its supplemental findings of March 9th, the Commission observed that "the record establishes that Cogan, who takes the position that he intended only to settle service charges reflected in the open account after 1930, put into evidence numerous documents and schedules in a mass of correspondence relating to the whole period from 1926 to 1935, and that most of this material was secured by Cogan as a result of subpoenas which we issued at his request."

Since the investigation ordered by the Commission covered the period from the first transaction or business connection, and that proved to be in 1925, it would be most unusual if the record did not show that such evidence and correspondence was offered. The Commission, in addressing the Third Circuit in this matter, stated to the Court that the investigation was ordered by it for the purpose of learning what transactions were had between the companies and with the intent of developing facts from which they might judge whether or not to take action.

There can be no doubt, on reading the findings of September 30, 1949, and the supplemental finding of March 9, 1950, that the sole purpose of the latter was to dispose of the claim asserted on behalf of Market Street, against Standard Power and Light Corporation.

Mr. Emil Morosini appeared before the District Court on behalf of Standard Power & Light Corporation; presumably he was in position to present to the Court the best argument available to Standard Power & Light Corporation which would show that the record before the Commission was sufficient to support the findings and opinions of the Commission with special reference to his client. It is noteworthy to observe that he could find nothing more important in the record to support his position than the quotation above set forth, taken from the supplemental findings of the Commission dated March 9, 1950.

POINT V

Requirements of hearing.

In *Shields* v. *Utah Idaho R. Co.,* 305 U. S. 177, 182, Mr. Chief Justice Hughes said:

> "The requirement of a 'hearing' has obvious reference 'to the tradition of judicial proceedings in which evidence is received and weighed by the trier of facts.' "

The "hearing" is the hearing of evidence and argument. *Morgan* v. *U. S.,* 468, 480.

"And the manifest purpose in requiring a hearing is to comply with the requirements of due process upon which the parties affected by the determination of an administrative body are entitled to insist."

With respect to hearings before administrative bodies, there must be (1) a reasonable time and place for hearing where interested parties may attend with reasonable effort, (2) a reasonable notice to the parties, (3) a reasonable opportunity for presentation of such evidence and argument as are appropriate to the proceeding.

> *Chamber of Commerce of Minneapolis,* F. T. C. 13 F. 2nd, 673 (C. C. A. 8th 1926).

Where any of the contracts or engagements with the corporation is challenged the burden is on the Board of Directors or stockholders not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein.

> *Geddes* v. *Anaconda Copper Mining Co.,* 254 U. S. 590, 599.

A finding without evidence is beyond the power of the Commission. An order was held void because the Commission considered material not introduced in evidence.

> *U. S.* v. *Abilene & Southern Ry.*, 265 U. S. 274, 286. Citing *New England Division Case*, 261 U. S. 184, 198, Note 19.

Nothing can be treated as evidence which is not introduced as such. All parties must be fully apprised of what the Commission is acting upon. The Commission in a proceeding before it must give the opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal.

> *I. C. C.* v. *Louisville & Nashville R. Co.*, 227 U. S. 88.

Failure to introduce evidence at the first hearing is not a proper ground for excluding it at subsequent hearings.

> *N. L. R. B.* v. *Cons. Edison Co.*, 305 U. S. 197.

POINT VI

Function of Court on enforcement proceedings.

"The findings of the Commission if supported by substantial evidence shall be conclusive." Sec. 24a Holding Company Act.

In

> *N. L. R. B.* v. *Bell Oil & Gas Co.*, 98 F. 2nd, 406 (C. C. A. 5th, 1938). Rehearing den. 98 F. 2nd, 870, 871 (C. C. A. 5).

It is well established that a plan of reorganization is not "fair and equitable" that does not limit or cancel, to

the extent appropriate to vindicate the rights of the corporation and its security holders, the claims of corporate managers, who in the conduct of the company's affairs before the institution of the proceedings have abused their trust.

> *Pepper* v. *Litton,* 308 U. S. 295, 306;
> *Re Taylor* v. *Standard Gas,* 306 U. S. 307.

> "We think that, in the reorganization proceeding the Courts may entertain on the merits objections to a plan even if made by one who might be barred from asserting a cause of action in his own behalf, if the subject matter of the objections is such that it goes beyond the objectors individual interests and affects the fairness and equity of the plan."

> *Comstock* v. *Group of Institutional Investors,* 335 U. S. 214.

The case of *S. E. C. Pet.* v. *Cent. Ill. Sec. Corp.* (226 and companion cases reported), 338 U. S. 96-139, 93 L. Ed. 1837-1879, holds that the administrative findings are not subject to reexamination by the Court unless they are not supported by substantial evidence or were not arrived at "in accordance with legal standards", and (a) 338 U. S. 126, 128:

> "Even with the latitude allowed by our present ruling for play of the Commission's judgment, it remains to consider whether in this case the Commission has complied with the statutory standards in its determination that the plan as amended by it is fair and equitable."

The Commission is unable in this proceeding to demonstrate that its findings are supported by substantial evidence. It is likewise unable to demonstrate that the plan

as amended and modified is fair and equitable, or its findings were arrived at in accordance with legal standards.

The findings of September 30, 1948, provided that if the plan was amended in conformity therewith, the Commission would approve it.

Normal procedure would be the issuance of an order of approval if the plan was amended in accordance with the said findings.

The said plan was amended to comply with the changes called for by the Commission but "something new had been added", a provision for the release of the "subsidiaries" of Standard and a recitation of an action against Standard Power and Light Corporation in the United States Court of New Jersey.

The Commission made an order on January 6, 1950, which recited in a prefatory paragraph:

> "Market Street having, on December 14, 1949, filed its Amended Plan for Liquidation and Dissolution (Amended Plan) *in accordance with the aforesaid Findings and Opinion of the Commission,* * * * " (italics ours).

The said order of January 6, 1950, directed all interested persons to show cause "why the amended plan should not be approved as requested."

This is surely a most casual way to treat a $625,000 action then at issue on behalf of Market Street Railway Company in the United States District Court, District of New Jersey.

The said order in reciting that the amended plan was filed in accordance with the aforesaid findings and opinion would import compliance therewith, yet, it made no reference to the fact that the amended plan recited the existence of the aforesaid action for $625,000. It made no ref-

erence to the fact that on or about October 14, 1949, William J. Cogan informed the Commission by letter that such action was started and enclosed a copy of the complaint.

On January 16, 1950, the return day of the said order to show cause it appeared that the purpose thereof was to remove the hurdle of the action against Standard Power and Light Corporation.

Mr. Murray Taylor, of Seibert & Riggs, appeared on behalf of Standard Power & Light Corporation and stated (R. 1032):

> "I am appearing for the first time on behalf of Standard Power & Light Corporation, Mr. Examiner. We received by registered mail a notice of the hearing today.
>
> "Standard Power & Light Corporation is not a party to this proceeding, but we would like a right to be heard, and we would like an opportunity to examine very shortly an officer of Market Street Railway, and a member of the Committee."

Mr. Taylor was granted leave to be heard (R. 1032).

Mr. Taylor examined Mr. Cyril Appel, Vice President and General Counsel of Market Street Railway Company (R. 1037-1040). (Commission Record.)

Mr. Joseph Auerbach, as an attorney for the Commission, chose to characterize the proceeding as follows:

> (R. 1037) (However), "I do not believe that this was intended to be an evidentiary hearing, in so much as it specifically states it is a hearing for persons to show cause."
>
> (R. 1050) "* * * I don't believe this is the place to analyze the record orally. We have a record which presumably satisfied all counsel. Mr. Cogan, as I understand him this morning, takes the position that the

record was a record only to settle the account. Hence, only to settle transactions which occurred from 1931. I think he said onward."

(R. 1070) "I think I can reply shortly to that, Mr. Hanson. I don't think we are really opening the record this morning. What we are doing is submitting documents for the record which will allow the Commission to consider whether the record should be reopened and, of course, the Commission order here is an order to show cause whether the amended plan should be approved. Obviously conversely whether it should not be approved."

The Commission made supplementary findings on March 9, 1950, which support the conclusion that the purpose of the show cause proceeding was to permit a brush-off of the action against Standard Power & Light Corporation.

The supplemental findings say, among other things, that the only question raised related to the finding regarding allowances for services "and the effect of the quoted language upon the claim asserted on behalf of Market Street against Standard Power in the legal action mentioned above."

The fact is that Standard Gas and Electric Company by its attorney, Mr. Helmer Hanson, was responsible for providing in the amended plan for the release of the subsidiaries of Standard Gas and Electric Company (R. 1047). The record thus shows that it was not a voluntary plan. Moreover, William J. Cogan, in the course of showing cause why the amended plan should not be approved demonstrated that misleading and improper findings of September 30, 1949, provided a good reason, and also demonstrated wherein the Commission had not given the proper, if any, weight to the $625,000 action against Standard Power & Light Corporation.

The record made in this matter on January 16, 1950, is set forth at pp. 1029-1131 of Commission record.

If no other or better reason existed (and there are others) for the conclusion that the Commission's findings, opinions and order lack the support of substantial evidence and that the plan, as amended and as modified.

POINT VII

Alternative causes of action available to prior preference stockholders (owners of stock at times complained of) on behalf of Market Street Railway Company as facts were developed in S.E.C. investigatory proceeding.

Any analysis of the facts as they were developed in the course of the investigation of past and present business transactions had between Standard Gas and Electric Company, Market Street Railway Company and Byllesby Engineering and Management Corporation, which later became Public Utility Engineering and Service Corporation warrants the conclusion that a variety of actions were available, choice of which would be a matter of practical consideration.

A cause of action arose against Ladenburg Thalmann and Company, a copartnership, of New York City, N. Y., and H. M. Byllesby and Company, Chicago, Illinois and Standard Gas and Electric Company, jointly and severally, as tort feasors, arising out of a certain contract dated March 22, 1926 made by and between them, which provided, among other things that if and when H. M. Byllesby and Company or Standard Gas and Electric Company were able to secure the election of directors of Market Street Railway Company, they would vote to elect one-fifth of the Board from designees of Ladenburg Thalmann; that all management fees paid by Market Street Railway Company (among others) less expenses incurred were to be paid to Standard Power and Light Corporation; that Standard Power and Light Corporation was to become the

owner of any common shares of stock of Market Street Railway Company then held by or in the interest of United Railways Investment Company and/or California Railway & Power Company acquired in connection with trading arrangements set forth in said agreement. Following the execution of said agreement and pursuant to the terms thereof Standard Power and Light Corporation was paid during 1926, 1927, 1928 and 1929 the total sum of $270,000 from management fees paid by Market Street Railway Company. As of March 22, 1926 Ladenburg Thalmann and Company and Standard Gas and Electric Company each owned 15,000 shares of a total of 30,000 Class B shares of capital stock of Standard Power and Light Corporation representing the sole voting stock of said corporation and each had selected one-half of the members of the Board of Directors of Standard Power and Light Corporation, and H. M. Byllesby and Company controlled Standard Gas and Electric Company.

A cause of action arose against Standard Power and Light Corporation to recover for Market Street Railway Company the $270,000 which was paid to Standard Power and Light Corporation by Byllesby Engineering and Management Corporation and represented profits from management fees paid by Market Street Railway Company to the management company, which was a wholly-owned subsidiary of Standard Gas and Electric Company, and for which Standard Power and Light Corporation paid no consideration. From 1927 to January 7, 1930 Standard Power and Light Corporation owned 39.67% of the voting stock of Market Street Railway Company.

A written agreement dated October 10, 1928 between Standard Power and Light Corporation, Standard Gas and Electric Company and Byllesby Engineering and Management Corporation (set forth in full in Appendix) confirms and accentuates the arrangement for Standard

Power and Light Corporation to receive the profit from management fees paid by Market Street Railway Company.

The cause of action just referred to as available against Standard Power and Light Corporation was asserted and action started thereon by Cross-appellant Charles T. Jones et als., in the United States District Court, for New Jersey on October 14, 1949.

A cause of action arose against Standard Gas and Electric Company to recover the profits from management fees paid by Market Street Railway Company from 1930 to 1935 which amounted to the principal sum of $355,000 profit based upon 40% of management payments to which may be added $276,900 interest for a total offset in favor of Market Street Railway Company in the sum of $621,900. It would also be a proper offset against money otherwise owed to Standard Gas and Electric to Credit Market Street with the amount of interest it paid during 1930-1935 on sums of money now found to represent improper charges. This cause of action arises from the fact that since January 7, 1930 Standard Gas and Electric Company was the owner directly of 39.67% of voting stock of Market Street Railway Company and violated its fiduciary duty to refrain from exacting a profit in charging management fees.

Standard Gas and Electric Company would also be liable to Market Street Railway Company for the overcharges for management during 1926 to 1929 since it shared control of Standard Power and Light Corporation during those years.

H. M. Byllesby and Company would likewise be liable to Market Street Railway Company as controlling stockholder since it controlled Standard Gas and Electric Company at all times during 1926 to 1935.

The Supreme Court in *Consolidated Rock Products*, 312 U. S. 510, 522, said:

"* * * A holding company, as well as others in dominating or controlling positions (Pepper v. Litton, 308 U. S. 295), has fiduciary duties to security holders of its system which will be strictly enforced. See Taylor v. Standard Gas and Electric Company, 306 U. S. 307. * * *"

The Supreme Court of the United States in *Southern Pacific Co.* v. *Bogert,* 250 U. S. 483 held that it was immaterial whether the control is exercised directly by the dominating majority stockholder or through a subsidiary, stating, at pages 487-8:

"The rule of corporation law and of equity invoked is well settled and has been often applied. The majority has the right to control; but when it does so, it occupies a fiduciary relation toward the minority, as much so as the corporation itself or its officers and directors * * *".

The Court said in *Guaranty Trust Company* v. *Grand Rapids etc.,* 7 F. Supp. 511, affd. 85 F. 2nd, 231 (CCA 6—1936, cert. den. in part 299 U. S. 591 granted in part 299 U. S. 534, dismissed on Stip. 299 U. S. 618:

"Contracts for payment of management, engineering and contractors' fees are subject to careful scrutiny by the Courts, and if evidence exists of overreaching, made possible by the lack of disinterested representation on behalf of one of the parties, there should be no hesitancy on the part of a Court of equity in requiring restitution."

In *Thomas* v. *Brownsville, Fort Kearney & Pac. R. R.,* 109 U. S. 522 (1883) the Court held that a contract between Boards of Directors having a majority of members in common, whereby exorbitant profits were derived was voidable. Since the contract price no longer remained

the measure of the claim for material and labor, it could recover only for the actual cost to it of the services rendered.

The actions on behalf of Market Street Railway Company might be many and diverse and for the same or similar liability. The only limitation on this rule is that there can be only one complete satisfaction.

The Commission might have chosen to exercise its jurisdiction and to have directed a hearing on the question of relative liability of the two holding companies it has under its jurisdiction toward Market Street Railway Company and each other. It did not take jurisdiction over the cause of action asserted in the United States District Court on behalf of Market Street Railway Company against Standard Power and Light Corporation and therefore cannot deprive the plaintiffs of their day in Court and the attempt to dispose of said action without a hearing thereon and without taking jurisdiction is an abuse of discretion.

POINT VIII

Inadequate judicial review.

The Honorable Louis Goodman, District Judge, stated (R. 739):

> "I have heard all the arguments in the matter. Of course, I haven't examined the record, that is, at least that portion of the record which consists of the transcript, and needless to say, I haven't examined any of the matters that are contained in the trunk, documents and what not."

The court below in this case did not afford appellants proper judicial review of the Commission's action.

The court expressly followed a standard of judicial review the Supreme Court has since held to be improper.

Universal Camera Corp. v. *National Labor Relations Board*, 19 U. S. L. Week 4160 (U. S. Feb. 26, 1951);

National Labor Relations Board v. *The Pittsburgh Steamship Co.*, 337 U. S. 656; 19 U. S. L. Week 4136 (U. S. Feb. 26, 1951).

In spite of the short record but more numerous exhibits and the appellants' contention that the Commission's action was not supported by substantial evidence, the court below failed to review "the record as a whole" and failed to rule on the question of whether the Commission's orders and findings are supported by substantial evidence (except with regard to the denial of legal fees which were found to be not supported by substantial evidence).

It is apparent that the Court was following what he deemed to be the judgment he would be inclined to use and he sought a rule of thumb decision.

For all practical purposes the appellants did not have their day in Court.

Under the holding in the *Universal Camera Corporation* case (19 U. S. L. Week 4160—U. S. Feb. 26, 1951) the court below had the duty with reference to the decision of the Commission to determine whether

> "the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes.
>
> "courts must now assume more responsibility for the reasonableness and fairness of * * * (administrative) decisions than some courts have shown in the past."

Dated, May 4, 1951.

Respectfully submitted,

William J. Cogan,
M. Mitchell Bourquin,
Attorneys for Cross-Appellants.

APPENDIX

Commission's Exhibit 122.

This Agreement, dated the 19th day of June, 1925, between Ladenburg, Thalmann & Co., a co-partnership, in the Borough of Manhattan, City of New York, (hereinafter called Ladenburg), party of the first part, H. M. Byllesby and Company, a corporation of the State of Delaware, (hereinafter called Byllesby) party of the second part, and Standard Gas and Electric Company, a corporation of the State of Delaware, (hereinafter called Standard) party of the third part,

Witnesseth:

All the parties hereto are or are to be interested, as stockholders of two new corporations to be formed pursuant hereto, in the property of Pittsburgh Utilities Corporation, a New York corporation, and have come to the agreements herein contained with respect to the management thereof and with respect to the other matters covered by this agreement.

1. There shall be formed the Standard Power and Light Corporation, under the laws of the State of Delaware under a charter satisfactory to counsel for all parties hereto which shall have only one class of voting stock consisting of thirty thousand (30,000) shares of Class B Common Stock, without par value, of which one-half will be owned by Ladenburg or their nominee and the other half owned by Standard or its nominee, and the charter shall provide that one-half the directors shall at all times be elected by the stock to be initially owned by Ladenburg, or their nominee, and that the other half shall at all time be elected by the stock to be initially owned by Standard, or its nominee.

Standard Power and Light Corporation shall also presently issue one hundred thousand (100,000) shares of Preferred Stock and four hundred and ten thousand (410,000) shares of Class A Common stock, out of a total authorized

issue of five hundred thousand (500,000) shares of Preferred Stock and eight hundred thousand (800,000) shares of Class A Common Stock, all without par value. The one hundred thousand (100,000) shares of Preferred Stock and one hundred ten thousand (110,000) shares of Class A Common Stock to be presently issued are to be allocated to members of the public, now the holders of one hundred thousand (100,000) shares of Preferred Stock and one hundred thousand (100,000) shares of Common Stock of Standard Power and Light Corporation, a Maryland corporation; and one hundred and fifty thousand (150,000) shares of Class A Common Stock will be owned by Byllesby, or its nominee.

The preferences, rights and privileges of the various classes of stock shall be such as are agreed upon by the counsel for all parties.

Byllesby is to procure the transfer to Standard Power and Light Corporation (Delaware) of eighty thousand one hundred (80,100) shares of Preferred Stock of Pittsburgh Utilities Corporation, a New York corporation, represented in part by voting trust certificates, for the price of $2,344,500.

Ladenburg are to procure the transfer to Standard Power and Light Corporation (Delaware) of at least four hundred and sixty thousand (460,000) shares and not more than five hundred and five thousand (505,000) shares of Preferred Stock of said Pittsburgh Utilities Corporation, represented by voting trust certificates in whole or in part. In the acquisition of such shares there shall be paid and delivered to Ladenburg, Thalmann & Co., fifteen dollars ($15) per share plus $1,555,500 and one hundred and fifty thousand (150,000) shares of the Class A Common Stock of Standard Power and Light Corporation (Delaware). It is understood that at least ninety-four thousand four hundred (94,400) shares of Preferred Stock of Pittsburgh Utilities Corporation to be transferred by Ladenburg are

now owned or controlled by themselves, and that the remainder of the minimum of four hundred and sixty thousand (460,000) shares are owned by the following named corporations, from whom Ladenburg have received written authority to sell the same, to wit:

Name	*No. of Shares*
First Security Company	94,000
Chase Securities Corporation	54,000
Haystone Securities Corporation ...	17,600
Union Trust Company of Pittsburgh	200,000

The delivery of the said shares of Preferred Stock of said Pittsburgh Utilities Corporation to Standard Power and Light Corporation (Delaware) and the payment of the consideration therefor are to be made concurrently on or before July 27, 1925.

2. There shall also be formed a corporation under the laws of the State of Delaware under a charter to be approved by counsel for all parties, herein referred to as United Railways Investment Holding Corporation, to which shall be transferred by or on behalf of Byllesby or Standard seventy-one thousand eight hundred (71,800) shares of Preferred Stock and one hundred twenty-three thousand three hundred (123,300) shares of Common Stock of United Railways Investment Company, a New Jersey Corporation, which latter corporation, among other things, owns two hundred and forty thousand (240,000) shares of the Common Stock (being all the common Stock outstanding) of Pittsburgh Utilities Corporation, which shares of Common Stock are represented by voting trust certificates. Such corporation so to be formed shall have an authorized capitalization of Nine million, nine hundred and ninety-nine thousand Dollars ($9,999,000) of Preferred Stock, represented by ninety-nine thousand nine hundred and ninety

(99,990) shares of a par value of one hundred dollars ($100.) each, and one thousand dollars ($1,000) par value of Common Stock, consisting of one thousand (1,000) shares of a par value of One dollar ($1) each. Seven million dollars ($7,000,000) in par value of non-voting Preferred Stock shall be issued to Standard or to Byllesby, or their respective nominees, in exchange for the aforesaid shares of Preferred and Common Stock of United Railways Investment Company. Five hundred (500) shares of the Common Stock shall be issued to Byllesby, or its nominee, and five hundred (500) shares of the Common Stock shall be issued to Ladenburg, or their nominee, for a nominal consideration, and the charter shall provide that one-half the directors shall at all times be elected by the stock to be initially owned by Ladenburg, or their nominee, and that the other half shall at all times be elected by the stock to be initially owned by Byllesby, or its nominee. The preferences, privileges and other characteristics of the Preferred Stock and the Common Stock shall be such as are agreed upon by counsel for all parties.

3. It is understood as a simultaneous condition of the purchase from or through Ladenburg of not less than four hundred and sixty thousand (460,000) shares of Preferred Stock of Pittsburgh Utilities Corporation, pursuant to paragraph 1. of this Agreement, that Ladenburg shall procure the resignations of L. F. Loree and M. B. Starring, or, at Ladenburg's option, of B. S. Guinness in lieu of M. B. Starring, as Voting Trustees, and shall appoint J. J. O'Brien (hereby selected by Standard) and another executive of Standard to be selected by Standard in their places as Voting Trustees under the Pittsburgh Utilities Corporation Voting Trust Agreement, dated January 17, 1925. Ladenburg hereby agree that in the event of any vacancy in the office of any Voting Trustee selected by Standard another Voting Trustee shall be appointed by

Ladenburg to fill such vacancy who shall be selected by Standard and directly connected as an executive with the organization of Standard. In the event that Ladenburg shall not appoint a Voting Trustee or Voting Trustees selected by Standard under the circumstances set forth in this paragraph, within thirty (30) days after having received a notice from Standard of the person or persons selected by Standard so to be appointed as Voting Trustee or Voting Trustees, then Ladenburg will upon the expiration of such thirty (30) days sell to Byllesby at its request the one hundred and fifty thousand (150,000) shares of Class A Common Stock of Standard Power and Light Corporation (Delaware) to be delivered to Ladenburg or their nominee, pursuant to paragraph 1 of this Agreement, or so many thereof as may not have been sold pursuant to paragraph "6" of this Agreement, for the consideration of one hundred thousand dollars ($100,000), or one dollar ($1.) per share, whichever may be less, and Ladenburg will further sell to Byllesby at its request the five hundred (500) shares of Common Stock of United Railways Investment Holding Corporation, to be issued to Ladenburg or their nominee, pursuant to paragraph 2 of this Agreement, for the consideration of five hundred dollars ($500), and Ladenburg will sell to Standard at its request the fifteen thousand (15,000) shares of Class B Common Stock of Standard Power and Light Corporation (Delaware) to be issued to Ladenburg or their nominee, pursuant to paragraph 1 of this Agreement, for the consideration of fifteen thousand dollars ($15,000).

4. Ladenburg, Byllesby and Standard hereby each agrees with the other (1) not directly or indirectly to promote, further or participate in any of the following named acts of (I) Pittsburgh Utilities Corporation (II) Philadelphia Company (III) Duquesne Light Company (IV)

Commission's Exhibit 122.

Pittsburgh Railways Company or (V) any other corporation controlled, directly or indirectly, by said Pittsburgh Utilities Corporation, Philadelphia Company, Duquesne Light Company and/or Pittsburgh Railways Company, whether such control be by ownership of stock in any such other corporation by said Pittsburgh Utilities Corporation, Philadelphia Company, Duquesne Light Company and/or Pittsburgh Railways Company and/or by any corporation controlled by any one or more of them, or by any other manner or method whatsoever, to the extent that any of such acts by such other corporation would make a change in the ownership or control of the electric light, power, artificial and natural gas, and/or street railway systems of Philadelphia Company, or Duquesne Light Company or Pittsburgh Railways Company or of any substantial part of any thereof, and (2) to prevent by all the means in its power the doing of any of said acts, and (3) that if any of said acts nevertheless shall be done not to share in any of the profits thereof, directly or indirectly, unless in any such case the said acts shall have been previously agreed upon between Byllesby and Ladenburg:

(a) the reclassification of any class of stock of the pertinent corporation;

(b) the alteration of the terms of any class of stock of the pertinent corporation;

(c) the creation of any new class of stock of the pertinent corporation;

(d) the increase in the authorized amount of any class of stock of the pertinent corporation;

(e) the sale, other disposition, mortgage or pledge by the pertinent corporation of the stock (or voting trust certificates therefor) of any other corporation in which it may hold a controlling voting interest, in

any manner which may cause it, except in event of default under the terms of the mortgage or pledge, to lose such controlling voting interest;

(f) the distribution of any shares of stock (or voting trust certificates therefor) of any other corporation in which the pertinent corporation may hold a controlling voting interest, among its stockholders by way of dividend or otherwise;

(g) the liquidation in whole or in part or other winding up of the pertinent corporation;

(h) the vote of any stock in any other corporation in which the pertinent corporation may hold a controlling voting interest to permit a recapitalization of such other corporation in such manner that the pertinent corporation shall lose its controlling voting interest therein;

(i) the sale, mortgage, lease or other disposition of all the property of the pertinent corporation, or of so much thereof as shall work a substantial change in the nature of its business (except for the refunding of the outstanding bonds assumed by Pittsburgh Utilities Corporation, and then only on such terms that the controlling interest of Pittsburgh Utilities Corporation in Philadelphia Company shall not be jeopardized, except in the event of default under the terms of the mortgage or pledge);

(j) the issue by the pertinent corporation through its directors or otherwise of any authorized but as yet unissued shares of its capital stock, or treasury stock, or securities convertible into shares of its capital stock;

(k) the merger or consolidation of the pertinent corporation into or with any other corporation except

the act of Duquesne Light Company, Philadelphia Company and/or Pittsburgh Railways Company in causing consolidations or mergers into each, respectively of its respective subsidiary companies.

Without limiting the generality of the words "promote, further or participate" it is hereby expressly agreed that the vote either as a director of the pertinent corporation or of any other corporation, or as a Voting Trustee, or as the holder of any proxy, of any member, officer or director of Ladenburg or of any firm or corporation controlled by them, or of any Voting Trustee (unless selected by Byllesby or by Standard) whose successor is appointable by Ladenburg under any Voting Trust Agreement, (hereinafter called Ladenburg Officials), and the vote either as a director of the pertinent corporation or of any other corporation, or as a Voting Trustee, or as the holder of any proxy, of any member, officer or director of Byllesby or of Standard (respectively) or of any firm or corporation controlled by Byllesby or Standard (respectively) or of any Voting Trustee selected by Byllesby or Standard respectively, (hereinafter called Byllesby Officials and Standard Officials respectively) in favor of any such proposition, shall be included within the meaning of the said words.

If at any meeting there shall be voting at least one Ladenburg Official and at least one Byllesby Official or Standard Official, and the votes of all the Ladenburg Officials, Byllesby Officials and Standard Officials who shall be voting at that meeting shall be cast to the same effect, then it shall be conclusively presumed that Ladenburg and Byllesby have reached an agreement to that effect.

None of the covenants of this paragraph 4 shall be deemed to have been violated unless and until one of the acts specified in sub-divisions (a) to (k) shall have been consummated by the pertinent corporation.

Commission's Exhibit 122.

5. Ladenburg agree with Byllesby that if Ladenburg shall commit any violation of any of their agreements contained in paragraph 4, then Ladenburg will, within thirty days after such violation, sell to Byllesby at its request the one hundred fifty thousand shares (150,000) of Class A Common Stock of Standard Power and Light Corporation (Delaware), to be delivered to Ladenburg or their nominee, pursuant to paragraph 1 of this agreement, or so many thereof as may not have been sold pursuant to paragraph 6 of this Agreement, for the consideration of One hundred thousand dollars ($100,000) or one dollar ($1.,) per share, whichever may be less, and Ladenburg will further sell to Byllesby at its request the five hundred shares (500) of Common Stock of United Railways Investment Holding Corporation, to be issued to Ladenburg or their nominee, pursuant to paragraph 2 of this agreement, for the consideration of five hundred dollars ($500.). Ladenburg agree with Standard that if Ladenburg shall commit any violation of any of their agreements contained in paragraph 4, then Ladenburg will, within thirty days after such violation, sell to Standard at its request the fifteen thousand shares (15,000) of Class B Common Stock of Standard Power and Light Corporation (Delaware), to be issued to Ladenburg or their nominee, pursuant to paragraph 1 of this Agreement for the consideration of fifteen thousand dollars ($15,000).

Byllesby and Standard jointly and severally agree with Ladenburg that if either Standard or Byllesby shall commit any violation of any of its respective agreements contained in paragraph 4, then Byllesby will, within thirty days after such violation, sell to Ladenburg at their request the one hundred fifty thousand shares (150,000) of Class A Common Stock of Standard Power and Light Corporation (Delaware), to be issued to Byllesby or its nominee, pursuant to paragraph 1 of this Agreement, or so

many thereof as may not have been sold pursuant to paragraph 6 of this Agreement, for the consideration of one hundred thousand dollars ($100,000), or one dollar ($1.) per share, whichever may be less, and Byllesby will further sell to Ladenburg at their request the five hundred shares (500) of Common Stock of United Railways Investment Holding Corporation, to be issued to Byllesby or its nominee, pursuant to paragraph 2 of this Agreement, for the consideration of five hundred dollars ($500.), and Standard will sell to Ladenburg at their request the fifteen thousand shares (15,000) of Class B Common Stock of Standard Power and Light Corporation (Delaware), to be issued to Standard or its nominee, pursuant to paragraph 1 of this Agreement, for the consideration of fifteen thousand dollars ($15,000).

6. Ladenburg and Byllesby agree that none of the one hundred fifty thousand (150,000) shares of Class A Common Stock of Standard Power and Light Corporation, (Delaware), to be issued to Byllesby or its nominee, pursuant to paragraph 1 of this Agreement, and none of the one hundred fifty thousand (150,000) shares of Class A Common Stock of Standard Power and Light Corporation (Delaware) to be delivered to Ladenburg or their nominee, pursuant to paragraph 1 of this Agreement, shall be sold without the consent of both Byllesby and Ladenburg, and that in the event that any of said three hundred thousand (300,000) shares of Class A Common Stock of Standard Power and Light Corporation (Delaware) shall be sold, the sale shall be made equally for the account of Ladenburg and of Byllesby, unless a contrary agreement shall have been made in writing signed both by Ladenburg and Byllesby prior to any such sale.

7. To assure and secure the performance of the agreements made by the parties hereto contained in paragraphs 5 and 6 of this Agreement, the parties hereto agree that

there shall be deposited with The Chemical National Bank of New York:

(1) by Ladenburg: One hundred fifty thousand (150,000) shares of Class A Common Stock of Standard Power and Light Corporation (Delaware), and fifteen thousand (15,000) shares of Class B Common Stock of Standard Power and Light Corporation (Delaware), and five hundred (500) shares of Common Stock of United Railways Investment Holding Corporation.

(2) By Standard and/or by Byllesby: One hundred fifty thousand (150,000) shares of Class A Common Stock of Standard Power and Light Corporation (Delaware), and fifteen thousand (15,000) shares of Class B Common Stock of Standard Power and Light Corporation (Delaware), and five hundred (500) shares of Common Stock of United Railways Investment Holding Corporation.

Such deposit shall be made concurrently by Ladenburg, Standard and Byllesby as and when the aforesaid shares of stock are respectively issued and delivered to them or their nominees respectively.

Such deposit shall be made pursuant to an agreement with The Chemical National Bank of New York, or a letter of instructions to The Chemical National Bank of New York satisfactory to counsel for all parties, which shall contain provisions consistent with the provisions of this Agreement and devised for the purpose of effectuating its provisions, including the authority to The Chemical National Bank of New York to release shares of Class A Common Stock of Standard Power and Light Corporation (Delaware) as and when the same shall be sold with the consent of Ladenburg and Byllesby, and to release shares of Class A Common Stock of Standard Power and Light

Corporation (Delaware), Class B Common Stock of Standard Power and Light Corporation (Delaware), and Common Stock of United Railways Investment Holding Corporation against payment therefor, as hereinabove provided, to The Chemical National Bank of New York for account of the party entitled to such payment in any of the events hereinabove specified in which any party may be entitled to purchase from another party such shares of Class A Common Stock and/or Class B Common Stock of Standard Power and Light Corporation (Delaware) and/or shares of Common Stock of United Railways Investment Holding Corporation.

8. Ladenburg agree that they will always permit at least two of the members of their firm as it now or hereafter may be constituted to act as directors of Pittsburgh Utilities Corporation, if nominated and elected by the stockholders; and that they will use their best endeavors to procure such nomination and election if thereunto requested by Byllesby. Byllesby agrees that it will always permit at least two of its executives to act as directors of Pittsburgh Utilities Corporation if nominated and elected by the stockholders; and Byllesby and Standard jointly and severally agree that they will use their best endeavors to procure such nomination and election if thereunto requested by Ladenburg.

9. This Agreement and the deposit of stock provided for by paragraph 7 shall continue either until the termination of both the Pittsburgh Utilities Corporation Voting Trust dated March 30, 1923, and the Pittsburgh Utilities Corporation Voting Trust dated January 17, 1925, or until the dissolution or complete liquidation of Pittsburgh Utilities Corporation, pursuant to Agreement reached between Ladenburg and Byllesby, whichever event shall first occur; except that the provisions of paragraph 6 hereof with respect to the sale by the parties of Class A Common Stock of Standard Power and Light Corporation (Delaware)

shall continue, notwithstanding the termination of the other parts of this Agreement, and notwithstanding the release of said stock from deposit with The Chemical National Bank of New York upon the termination of the other parts of this Agreement, until the expiratiion of ten years from the date of this Agreement.

10. The term Ladenburg means not only the present firm of Ladenburg, Thalmann & Co., but any person, firm, association or corporation which may hereafter carry on the business now conducted by Ladenburg, Thalmann & Co.

The term Standard means not only the present corporation of Standard Gas and Electric Company, but any person, firm, association or corporation which may hereafter carry on the business now conducted by Standard Gas and Electric Company.

The term Byllesby means not only the present corporation of H. M. Byllesby and Company, but any person, firm, association or corporation which may hereafter carry on the business now conducted by H. M. Byllesby and Company.

In witness whereof the parties hereto have duly executed these presents under seal as of the date hereof.

Ladenburg Thalmann & Co.,
H. M. Byllesby and Company
by Moritz Rosenthal
President

Attest:

C. H. O'Reilly
Secretary

Standard Gas and Electric Company

By R. J. Graf,
Vice President

Attest:

M. A. Morrison
Secretary

Commission's Exhibit 61.

THIS AGREEMENT made and entered this tenth day of October, 1928, by and between BYLLESBY ENGINEERING AND MANAGEMENT CORPORATION, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware (hereinafter for convenience sometimes termed the "Engineering Corporation"), party of the first part, STANDARD GAS AND ELECTRIC COMPANY, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware (hereinafter for convenience sometimes termed the "Holding Corporation"), party of the second part, and STANDARD POWER AND LIGHT CORPORATION, a corporation duly organized and existing under and by virtue of the Laws of the State of Delaware (hereinafter for convenience sometimes termed the "Standard Corporation"), party of the third part,

WITNESSETH:

WHEREAS, the Holding Corporation is the owner of all the issued and outstanding stock of the Engineering Corporation and is also the owner of all the issued and outstanding Participating Preferred Stock of the Standard Corporation and has in addition thereto other large stock interests in the Standard Corporation and, by virtue thereof, controls the Standard Corporation, all in accordance with a certain agreement dated the 22nd day of March, 1926, between Ladenburg, Thalmann & Co., Standard Gas and Electric Company and H. M. Byllesby and Company, which was submitted for approval to a meeting of the stockholders of the Holding Corporation duly held on the 21st day of April, 1926, and duly approved thereat, as well as duly approved by action of the Board of Directors of the Holding Corporation, which said agreement is hereinafter referred to as the agreement of March 22, 1926; and

WHEREAS, the agreement of March 22, 1926, provided, so far as is material to this contract, as follows:

Commission's Exhibit 61.

> "That all management, engineering and similar fees, less expenses incurred in connection with the earning of such fees, and less fees paid to any person, firm or corporation not directly or indirectly connected or affiliated with any party hereto, to be paid by Standard Power and Light Corporation or by United Railways Investment Company, or their respective succesors, and by their respective subsidiaries and sub-subsidiaries, as the same may now or hereafter exist, shall be paid to the aforesaid Standard Power and Light Corporation or to some corporation all the stock of which is owned by Standard Power and Light Corporation or to some corporation or fund or account jointly agreed upon between Ladenburg and Byllesby;"

and

WHEREAS, the Engineering Corporation has performed management, engineering and similar services and will perform management, engineering and similar services for Philadelphia Company, a corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania and other corporations controlled by Philadelphia Company and also for Market Street Railway Company, a corporation organized and existing under and by virtue of the laws of the State of California, all of which are hereby recognized as subsidiaries or sub-subsidiaries of the Standard Corporation (the corporation referred to in said agreement of March 22, 1926, and the party of the third part hereto) in respect of the disposition of management, engineering and similar fees, provided that it is understood that Kentucky West Virginia Gas Company is not for said purpose recognized as a subsidiary or sub-subsidiary of Standard Corporation; and

WHEREAS, neither Ladenburg, Thalmann & Co., (referred to in said agreement of March 22, 1926, as Ladenburg) nor

Commission's Exhibit 61.

H. M. Byllesby and Company (referred to in said agreement of March 22, 1926, as Byllesby) have made any agreement with respect to any other corporation, fund or account to which the management, engineering and similar fees shall be paid; and

Whereas, the Engineering Corporation in the performance of the provisions of said agreement of March 22, 1926 has paid or credited to the Standard Corporation amounts in respect of engineering, management and similar fees for the years 1926 and 1927 aggregating Seven Hundred and Eighty-Seven Thousand Five Hundred Seventy-Nine and 51/100 ($787,579.51) Dollars which are hereby recognized as being payment in full of all management engineering and similar fees which the Standard Corporation ought to receive for the years 1926 and 1927, pursuant to the provisions of the said agreement of March 22, 1926; and

Whereas, it is desired by the parties hereto specifically to set forth the manner in which the provisions of the said agreement of March 22, 1926 relating to management, engineering and similar fees shall be dealt with for the year 1928 and succeeding years;

Now, therefore, in consideration of the premises and of the mutual covenants, conditions and agreements herein contained, the parties hereto have agreed and do agree with one another as follows:

1. The Engineering Corporation shall maintain an accurate record of the actual cost to it of the services performed by it and expenditures made by it in the rendering of management, engineering and similar services for the subsidiaries and sub-subsidiaries of the Standard Corporation as defined above, from which shall be excluded all salaries of executive officers, rent of home office, general ex-

penses and all overhead items of the home office and also all items of cost for which the engineering Corporation may be specifically reimbursed by any of said subsidiaries or sub-subsidiaries. To the net actual cost so obtained there shall be added fifteen per cent (15%) thereof as compensation for the Engineering Corporations' salaries of executive officers, rent of home office, general expenses and overhead items of the home office and the result obtained by adding said fifteen per cent (15%) shall be deemed to be the Engineering Corporation's total expenses. The amount payable by the Engineering Corporation to the Standard Corporation pursuant to the agreement of March 22, 1926 for the year 1928 and subsequent years shall be the difference between the gross amounts received by the Engineering Corporation for management, engineering and similar services from the aforesaid subsidiaries and sub-subsidiaries of the Standard Corporation and the amount of its total expenses in and for each of said years, respectively. The Holding Corporation hereby agrees with the Standard Corporation that the Engineering Corporation will make such payment to the Standard Corporation and the Engineering Corporation hereby agrees with the Standard Corporation to make such payment to it, such agreement by the Engineering Corporation being made at the request of the Holding Corporation.

2. The Standard Corporation at any time may request and shall be given a detailed account of the manner in which any payment which may be made to it pursuant to this contract has been calculated, in order that it may ascertain whether such calculation has been made in accordance with the provisions of this contract.

3. This agreement may be cancelled by six months' written notice given by any party hereto to the other parties but notwithstanding such cancellation the above-quoted provision of the agreement of March 22, 1926, shall continue in effect.

Commission's Exhibit 61.

In witness whereof, the parties hereto have caused this agreement to be executed in triplicate by their respective Presidents or Vice Presidents and their respective seals to be hereto affixed and attested by their respective Secretaries or Assistant Secretaries pursuant to authority by their respective Board of Directors on the day and year first above written.

Byllesby Engineering and Management Corporation

By B. W. Lynch
Vice President

(seal)

Attest:

Herbert List
Assistant Secretary

Standard Gas and Electric Company

By R. J. Graf
Vice President

(seal)

Attest:

M. A. Morrison
Secretary

Standard Power and Light Corporation

By J. H. Briggs
Vice President

(seal)

Attest:

Wm. G. Pohl
Assistant Secretary

Commission's Exhibit 121.

This Agreement dated the 21st day of December, 1929 between Standard Gas and Electric Company, a corporation duly organized and existing under the laws of the State of Delaware (hereinafter called "Standard"), party of the first part, H. M. Byllesby and Company, a corporation duly organized and existing under the laws of the State of Delaware (hereinafter called "Byllesby"), party of the second part, and Ladenburg, Thalmann & Co., a co-partnership doing business in the Borough of Manhattan, City of New York (hereinafter called "Ladenburg"), party of the third part,

Witnesseth:

Whereas, Standard, Byllesby and Ladenburg entered into a certain agreement dated March 22, 1926 pursuant to which and pursuant to the terms of an Escrow Agreement dated April 23, 1926, there have been and are deposited with Chemical Bank and Trust Company, a New York corporation (as successor to The Chemical National Bank of New York), One Hundred Sixty-five Thousand (165,000) shares of Common Stock of Standard Power and Light Corporation, a Delaware corporation, belonging to Byllesby and One Hundred Sixty-five Thousand (165,000) shares of Common Stock of said Standard Power and Light Corporation belonging to or controlled by Ladenburg; and

Whereas, Ladenburg for itself and for those whom it represents is desirous of selling said One Hundred Sixty-five Thousand (165,000) shares of Common Stock of said Standard Power and Light Corporation owned or controlled by it to United States Electric Power Corporation, a Maryland corporation, under the terms of an agreement of even date herewith (hereinafter sometimes called the

"Sale Agreement") to which Byllesby is likewise a party, which provides, among other things, that in the event of such sale, certificates for said One Hundred Sixty-five Thousand (165,000) shares of Common Stock of said Standard Power and Light Corporation shall be delivered by or on behalf of Ladenburg to said United States Electric Power Corporation at the office of Chemical Bank and Trust Company, in the Borough of Manhattan, City of New York; and

Whereas, said Sale Agreement provides in effect that Ladenburg may be required by said United States Electric Power Corporation to deposit certificates for said One Hundred Sixty-five Thousand (165,000) share of Common Stock of Standard Power and Light Corporation with said Chemical Bank and Trust Company prior to and pending the consummation of the sale thereof by Ladenburg to said United States Electric Power Corporation; and

Whereas, Standard and Byllesby are desirous of obtaining a cancellation of the aforesaid agreement dated March 22, 1926 and the aforesaid Escrow Agreement dated April 23, 1926; and

Whereas, said Escrow Agreement provides that The Chemical Bank of New York (of which Chemical Bank and Trust Company is the successor) may deliver all of the deposited stock upon the direction in writing signed by Ladenburg, Byllesby and Standard in accordance with the terms of said direction;

Now, Therefore, the parties hereto have agreed as follows:

1. Standard agrees with Ladenburg that it will forthwith at the written request of Ladenburg join with

Commission's Exhibit 121.

Byllesby and Ladenburg in a direction in writing addressed to Chemical Bank and Trust Company (as successor to The Chemical National Bank of New York) either (a) to deliver on behalf of Ladenburg to or for account of United States Electric Power Corporation certificates for One Hundred Sixty-five Thousand (165,000) shares of Common Stock of Standard Power and Light Corporation deposited by Ladenburg under the terms of the Escrow Agreement dated April 23, 1926 (hereinafter referred to as the "deposited certificates") or (b) to deliver the deposited certificates to Ladenburg solely for the purpose of having Ladenburg redeliver the deposited certificates to Chemical Bank and Trust Company with irrevocable instructions by Ladenburg to Chemical Bank and Trust Company (on such terms as may be stated in such irrevocable instructions by Ladenburg) to deliver the deposited certificates on behalf of Ladenburg to or for account of United States Electric Power Corporation or, if such delivery of said deposited certificates to or for account of United States Electric Power Corporation shall not have been consummated on or before February 28, 1930, or if United States Electric Power Corporation shall in writing advise Chemical Bank and Trust Company prior to February 28, 1930 that it will not accept delivery of the deposited certificates from or on behalf of Ladenburg, that then and thereupon said deposited certificates shall again be held by Chemical Bank and Trust Company subject to all the provisions of the aforesaid Escrow Agreement.

2. Byllesby agrees with Ladenburg that it will forthwith, at the written request of Ladenburg, but not later than two nor sooner than five days before the date on which it may reasonably be expected either (a) that the aforesaid proposed sale of One Hundred Sixty-five Thousaid (165,000) shares of Common Stock of Standard Power

and Light Corporation to United States Electric Power Corporation will be consummated or (b) that Ladenburg may be required by said United States Electric Power Corporation to deposit the deposited certificates with said Chemical Bank and Trust Company prior to and pending the consummation of the sale thereof by Ladenburg to said United States Electric Power Corporation, join with Standard and Ladenburg in a direction in writing addressed to Chemical Bank and Trust Company (as successor to The Chemical National Bank of New York) as described in Section 1 of this Agreement, provided that the terms stated in the irrevocable instructions given by Ladenburg to Chemical Bank and Trust Company shall be strictly in accordance with the provisions of the Sale Agreement unless the written consent of Byllesby to a variation of such irrevocable instructions shall theretofore have been obtained by Ladenburg.

3. Ladenburg agrees with Standard and Byllesby that it will not make any use of or deliver to Chemical Bank and Trust Company the direction in writing addressed to Chemical Bank and Trust Company provided for in Sections 1 and 2 of this Agreement except strictly in accordance with the terms of that certain agreement of even date herewith providing for said sale to United States Electric Power Corporation to which agreement Byllesby is a party, unless the written consent of Byllesby to such other sale, transfer or disposition is first obtained by Ladenburg.

4. Ladenburg further agrees with Standard and Byllesby that when Standard and Byllesby shall have joined with Ladenburg in a direction in writing addressed to Chemical Bank and Trust Company, as provided in Sections 1 and 2 of this Agreement, Ladenburg forthwith will join with Standard and Byllesby in any written direction which

Standard and Byllesby may in writing request Ladenburg to make with respect to the delivery by Chemical Bank and Trust Company, immediately upon the delivery to or for account of United States Electric Power Corporation on behalf of Ladenburg of One Hundred Sixty-five Thousand (165,000) shares of Common Stock of Standard Power and Light Corporation, of the other One Hundred Sixty-five Thousand (165,000) shares of Common Stock of Standard Power and Light Corporation deposited with said Chemical Bank and Trust Company, provided that the delivery stipulated in such directions shall be contingent upon the final delivery by Chemical Bank and Trust Company of the deposited certificates on behalf of Ladenburg to or for account of United States Electric Power Corporation.

5. Standard, Byllesby and Ladenburg hereby mutually agree that *ipso facto* upon the final delivery on behalf of Ladenburg to or for account of United States Electric Power Corporation of the aforesaid One Hundred Sixty-five Thousand (165,000) shares of Common Stock of Standand Power and Light Corporation owned or controlled by Ladenburg, the aforesaid agreement between Standard, Byllesby and Ladenburg dated March 22, 1926 and the Escrow Agreement shall be cancelled and of no further effect whatsoever without the necessity for any further agreement of cancellation thereof but, at the written request of Standard and Byllesby, Ladenburg will forthwith join with them in executing an appropriate instrument of cancellation, cancelling and annulling the said agreement dated March 22, 1926, and the Escrow Agreement, as of the date of such delivery. Until the final delivery on behalf of Ladenburg to or for account of United States Electric Power Corporation of the aforesaid One Hundrd Sixty-five Thousand (165,000) shares of Common Stock of Standard Power and Light Corporation owned

or controlled by Ladenburg, the aforesaid agreement between Standard, Byllesby and Ladenburg dated March 22, 1926 shall be and remain in full force and effect except that Standard and/or Byllesby shall not make or offer to make any sale of any part of the One Hundred Sixty-five Thousand (165,000) shares of Common Stock of Standard Power and Light Corporation deposited by them or either of them under the terms of the Escrow Agreement on or prior to February 28, 1930 or on or prior to such earlier date, if any, on which United States Electric Power Corporation shall in writing advise Chemical Bank and Trust Company that it will not accept delivery of the deposited certificates from or on behalf of Ladenburg, and the Escrow Agreement shall likewise remain in full force and effect except as modified by the terms of this Agreement.

In witness whereof the parties hereto have duly executed this Agreement the day and year first above written.

Standard Gas and Electric Company

By ....

President.

H. M. Byllesby and Company

By J. H. Briggs

Vice President.

Ladenburg, Thalmann & Co.,

By ....

General Partner.

Part of Commission's Exhibit 72.

AGREEMENT dated the 21 day of December, 1929 between STANDARD GAS AND ELECTRIC COMPANY, a Delaware corporation (hereinafter called "Standard"), party of the first part, and STANDARD POWER AND LIGHT CORPORATION, a Delaware corporation (hereinafter called "Standard Power Corporation"), party of the second part,

WITNESSETH:

Whereas, Standard Power Corporation has outstanding securities and stocks as follows:

Twenty-four Million Dollars ($24,000,000) of its Six Per Cent Gold Debentures dated February 1, 1927, due February 1, 1957 (hereinafter referred to as the "Standard Power Debentures") all issued and outstanding under an agreement between said Standard Power Corporation and Guaranty Trust Company of New York, as Trustee, dated February 1, 1927 (hereinafter referred to as the "Standard Power Debenture Agreement");

Two Hundred Twenty Thousand (220,000) shares of Preferred Stock without par value entitled to cumulative dividends at the rate of Seven Dollars ($7) per share per annum;

Two Million Nine Hundred Ninety-seven Thousand and Fourteen (2,997,014) shares of Participating Preferred Stock without par value; and

Four Hundred Forty Thousand (440,000) shares of Common Stock without par value; and

Whereas, the Standard Power Debenture Agreement (wherein Standard Power Corporation is referred to as "the Company") in Section 2 of Article Thirteen thereof contains the following provisions:

"Section 2. In case the Company shall be consolidated with or merged into any other corporation, or

shall convey or transfer all its property as an entirety to another corporation, the successor corporation formed by such consolidation or into which the Company shall have been merged or which shall have received a conveyance or transfer as aforesaid—upon executing an instrument satisfactory to the Trustee whereby such successor corporation shall assume the due and punctual payment of the principal and interest of the debentures issued hereunder and the performance of all the covenants and conditions of this Agreement—shall succeed to and be substituted for the Company, party of the first part hereto, with the same effect as if it had been named herein as such party of the first part; and such successor corporation thereupon may cause to be signed and may issue, either in its own name or in the name of Standard Power and Light Corporation, any or all of such debentures issuable hereunder which theretofore shall not have been signed by the Company and delivered to the Trustee; and upon the order of said successor corporation in lieu of the Company and subject to all of the conditions herein prescribed, the Trustee shall authenticate and shall deliver any such debentures which previously shall have been signed and delivered by the officers of the Company to the Trustee for authentication and any of such debentures which such successor corporation thereafter shall cause to be signed and delivered to the Trustee for that purpose. All obligations so issued shall, in all respects, have the same legal rank and benefit as the debentures theretofore or thereafter issued, in accordance with the terms of this Agreement, as though all of said obligations had been issued at the date of the execution hereof."

and

Whereas, Standard Power Corporation is the owner of Nine Hundred Three Thousand Seven Hundred Thirty-Six and 9833/10000 (903,736.9833) shares of Common Stock of Philadelphia Company, a Pennsylvania corporation, out of Nine Hundred Sixty Thousand Two Hundred Five and 5833/10000 (960,205.5833) shares of said Common Stock of Philadelphia Company issued and outstanding, and it is likewise the owner of Thirty-eight thousand Two Hundred and Fifty (38,250) shares of Preferred Stock, Twenty-three Thousand Five Hundred (23,500) shares of Second Preferred Stock and Sixty Thousand (60,000) shares of Common Stock of Market Street Railway Company, a California corporation, representing approximately Forty Per Cent (40%) of the outstanding shares of stock of said Market Street Railway Company and Standard Power Corporation is likewise the owner of cash, accounts receivable and a certain number of readily marketable securities; and

Whereas, Standard is the owner of all the Participating Preferred Stock of Standard Power Corporation issued and outstanding and desires to acquire and purchase all the present assets of Standard Power Corporation and particularly the aforesaid shares of Common Stock of Philadelphia Company, and of Preferred Stock, Second Preferred Stock and Common Stock of Market Street Railway Company, and desires that Standard Power Corporation shall convey or transfer all its property as an entirety to Standard, upon the terms and conditions set forth in this Agreement; and

Whereas, there is now in effect an agreement or arrangement providing for the payment to Standard Power Corporation of profits which would otherwise enure to Byllesby Engineering and Management Corporation, a corporation organized under the laws of the State of Dela-

ware all the stock of which is owned by Standard, such profits arising from the management and/or engineering of Philadelphia Company and/or its subsidiary companies and Market Street Railway Company, which agreement or arrangement shall be cancelled and terminated as of the date of such transfer; and

Whereas, one of the inducements to Standard Power Corporation to the transfer of its assets to Standard as proposed in this Agreement, is the consummation of an agreement dated on the same date as this Agreement between United States Electric Power Corporation, a Maryland corporation, and Standard Power Corporation, substantially in the form hereto annexed as Schedule A; and

Whereas, in order to perform this Agreement and the aforesaid agreement with United States Electric Power Corporation, it is necessary that Standard Power Corporation, as a condition precedent thereto, amend its Certificate of Incorporation substantially in the form set forth in Exhibit B attached to the aforesaid Schedule; and

Whereas, Standard hereby represents to Standard Power Corporation that a true and correct consolidated balance sheet of Standard as of September 30, 1929 and a true and correct consolidated income statement of Standard for the twelve months ended September 30, 1929 are as hereto attached and marked Schedule B and that no substantial changes in the financial situation of Standard have occurred since September 30, 1929 otherwise than in the ordinary course of its business;

Now, Therefore, the parties hereto have agreed as follows:

1. Upon the terms and for the considerations set forth in this Agreement, Standard Power Corporation agrees to convey and transfer all its property as an entirety to Standard, particularly including therein Nine Hundred

Part of Commission's Exhibit 72.

Three Thousand Seven Hundred Thirty-six and 9833/10000 (903,736.9833) shares of the Common Stock of Philadelphia Company, and Thirty-eight Thousand Two Hundred and Fifty (38,250) shares of Preferred Stock, Twenty-three Thousand Five Hundred (23,500) shares of Second Preferred Stock and Sixty Thousand (60,000) shares of Common Stock of Market Street Railway Company and Four Hundred fifty-eight Thousand Dollars ($458,000) in principal amount of Sierra and San Francisco Power Company 5% Bonds, Series B, and Standard Power Corporation agrees to cancel the aforesaid agreement or arrangement providing for the payment to Standard Power Corporation of profits which would otherwise enure to the aforesaid Byllesby Engineering and Management Corporation from the management and/or engineering of Philadelphia Company and/or its subsidiary companies and Market Street Railway Company.

2. In consideration of said transfer and conveyance, Standard agrees with Standard Power Corporation as follows:

(a) Coincident with such transfer and conveyance or immediately thereafter, to join with Standard Power Corporation in the execution of an instrument satisfactory to Guaranty Trust Company of New York as Trustee under the Standard Power Debenture Agreement whereby Standard shall be recognized by Standard Power Corporation as successor corporation to Standard Power Corporation under the terms of said Standard Power Debenture Agreement and whereby Standard shall assume the due and punctual payment of the principal and interest of the Standard Power Debentures issued thereunder and the performance of all the covenants and conditions of the Standard Power Debenture Agreement; and whereby Standard shall

surrender the right and power to issue any debentures under the provisions of Article Three and Article Four of the said Standard Power Debenture Agreement;

(b) Coincident with such transfer and conveyance, to surrender to Standard Power Corporation for cancellation, pursuant to due corporate action of Standard Power Corporation, Two Million Nine Hundred Ninety-seven Thousand and Fourteen (2,997,014) shares of the Participating Preferred Stock of Standard Power Corporation as well as all other shares, if any, of the Participating Preferred Stock of Standard Power Corporation which may then be outstanding;

(c) Coincident with such transfer and conveyance, to issue and deliver to Standard Power Corporation a certificate or certificates for Two hundred twenty thousand (220,000) shares of Prior Preference Stock, $7 Cumulative, of Standard, having the same characteristics, right and preferences as the Prior Preference Stock, $7 Cumulative, of Standard now outstanding, in such denominations and registered in such names as may be requested by Standard Power Corporation;

(d) Coincident with such transfer and conveyance, to issue and deliver to Standard Power Corporation a certificate or certificates for Six Hundred Thousand (600,000) shares of Common Stock of Standard in such denominations and registered in such names as may be requested by Standard Power Corporation, which Six Hundred Thousand (600,000) shares of Common Stock of Standard shall be duly and validly issued and listed on the New York Stock Exchange unless such listing be waived by Standard Power Corporation; and

Part of Commission's Exhibit 72.

(e) Coincident with such transfer and conveyance, to pay Standard Power Corporation in cash an amount equal to the aggregate of cash and book value of accounts receivable included in such transfer and conveyance and the market value of the securities included in such transfer and conveyance other than the aforesaid Common Stock of Philadelphia Company and Preferred Stock, Second Preferred Stock and Common Stock of Market Street Railway Company and Bonds of Sierra and San Francisco Power Company (such other securities being hereinafter referred to as "Excess Securities"), less the amount of interest then accrued on the Standard Power Debentures to date of transfer, less also an amount equal to dividends at the rate of $1 per share per year, then accumulated and unpaid since the last day of the last quarterly period in respect of which dividends may have been paid thereon to the date of transfer, on the Two Million Nine Hundred Ninety-Seven Thousand Fourteen (2,997,014) shares of Participating Preferred Stock of Standard Power Corporation to be surrendered by Standard, less also an amount equivalent to dividends at the rate of Seven Dollars ($7) per share per year, then accumulated and unpaid since the last quarterly period in respect of which dividends may have been paid thereon to date of transfer on the Two Hundred and Twenty Thousand (220,000) shares of Prior Preference Stock, $7 Cumulative, of Standard to be issued to Standard Power Corporation, less also an amount equivalent to dividends at the rate of Three and 50/100 Dollars ($3.50) per share per annum, then accrued since the last dividend payment date thereof to date of transfer, on the Six Hundred Thousand (600,000) shares of Common Stock of Standard to be issued to Standard Power Corporation, plus an amount equal

to dividends at the rate of Seven Dollars ($7) per share per year, then accrued since the last day of the last quarterly period in respect of which dividends may have been paid thereon to date of transfer on the Nine Hundred Three Thousand Seven Hundred Thirty-six and 9833/10000 (903,736.9833) shares of Common Stock of Philadelphia Company to be transferred to Standard, plus also an amount equivalent to that portion of the engineering and/or management fees earned to the last day of the month preceding the effectuation of the aforesaid conveyance and transfer, by Byllesby Engineering and Management Corporation from Philadelphia Company and/or its subsidiary companies and Market Street Railway Company, which under the agreement or arrangement aforesaid as now in effect would be payable to Standard Power Corporation (such amounts in respect of interest, dividends and engineering and/or management fees, being hereinafter referred to as "cash adjustments"), or, in lieu of all cash as aforesaid, an amount of cash equal to the amount of cash included in such transfer and conveyance with cash and adjustments as aforesaid, and, in addition thereto, readily marketable securities, satisfactory to Standard Power Corporation having the same market value as the Excess Securities included in said transfer and conveyance.

3. Standard and Standard Power Corporation agree that coincident with the execution of the instrument with Guaranty Trust Company of New York, as Trustee, referred to in Subdivision (a) of Paragraph 2 of this Agreement they will execute and deliver an agreement whereby Standard shall assume the due and punctual payment of the principal and interest of the Standard Power Debentures and the performance of all the covenants and conditions of the Standard Power Debenture Agreement and

will indemnify Standard Power Corporation against all loss, damage and liability arising out of or from or by reason of the said Standard Power Debentures and the said Standard Power Debenture Agreement; and Standard Power Corporation will agree at the expense of Standard from time to time to do or perform all things that may be necessary, convenient or desirable in order that Standard shall be able to exercise and possess as successor corporation to Standard Power Corporation under said Standard Power Debenture Agreement, all the rights and powers of Standard Power Corporation under said Standard Power Debenture Agreement, except the right and power to issue debentures under the provisions of Article Three and Four of the said Standard Power Debenture Agreement.

4. Standard Power Corporation hereby warrants to Standard that the accounts receivable of Standard Power Corporation to be transferred to Standard as hereinabove provided, are valid accounts receivable and are collectible to the full extent of their book value and agrees with Standard that it will reimburse Standard for any part of such book value which Standard may not be able to collect.

5. None of the provisions of this Agreement shall be performed unless, prior thereto, the Certificate of Incorporation of Standard Power Corporation shall have been amended substantially in the form set forth in Exhibit B to the form of agreement annexed hereto as Schedule A and unless, simultaneously therewith Standard Power Corporation shall acquire from United States Electric Power Corporation Five Hundred Eighty Thousand (580,000) shares of the Common Stock of Standard as provided in the aforesaid agreement of even date herewith between United States Electric Power Corporation and Standard Power Corporation substantially in the form hereto annexed as Schedule A and unless prior thereto or simul-

taneously therewith there shall be surrendered for cancellation to Standard against payment by Standard to the holders thereof of One Dollar ($1) per share, not less than Nine Hundred Ninety-nine Thousand Six Hundred Eighty-four (999,684) shares of the Six Per cent Non-Cumulative Stock of Standard; notwithstanding anything to the contrary herein contained, this Agreement shall not be performed if the aforesaid amendment to the Certificate of Incorporation of Standard Power Corporation shall not have become effective on or before January 28, 1930, unless the period within which said amendment may become effective shall be extended to and including February 25, 1930, by agreement between Standard and Standard Power Corporation pursuant to resolutions of their respective Board of Directors.

6. This Agreement shall not be valid or effective for any purpose unless and until approved by the stockholders of Standard in manner, substance and form satisfactory to Standard Power Corporation, and unless and until approved by the stockholders of Standard Power Corporation, in manner, substance and form satisfactory to Standard and shall become effective when such satisfaction is declared on the part of Standard by resolution of its Board of Directors and on the part of Standard Power Corporation by resolution of its Board of Directors.

In witness whereof, this Agreement has been duly executed by the respective parties hereto the day and year first above written.

Standard Gas and Electric Company

By J. J. O'Brien
President

Standard Power and Light Corporation

By R. J. Graf
Vice-President

Part of Stockholders' Committees Exhibit 58.

DONNER LAKE CAMP
etc.

July 4, 1926

Halford Erickson, Esq.
V. P. Byllesby Eng. & Man. Corp.
Chicago, Ill.

Dear Mr. Erickson:

Referring to your telegram of July 3rd, I would like to postpone the annual meeting of Market St. Ry. Co. for

(2)

one day, that is from July 14th to July 15 as I have to be in Stockton on the 14th.

My recommendations for directors are as follows:

Present Board	*Proposed Board*
J. J. O'Brien	Re-elect
Moritz Rosenthal	Re-elect
M. B. Starring	R. J. Graf
H. T. Scott	Halford Erickson
Leander Sherman—deceased	M. McCants
G. B. Willcutt	Re-elect
A. W. Foster	Re-elect
J. W. Lilienthal, Jr.	Re-elect
W. M. Abott	Re-elect
General Hunter Liggett	Re-elect
Samuel Kahn	Re-elect

(3)

H. T. Scott has tendered his resignation as he is very old and not in good health.

Part of Stockholders' Committee Exhibit 58.

A. W. Foster is a high type of man, being a regent of the University of California and formerly president of Northwestern Pacific Railway.

J. W. Lilienthal, Jr. is the son of a former president of Market St. Ry. Co. and stands well in the community.

General Liggett was second in command in France during the World War.

(4)

Messrs. Foster, Lilienthal and Liggett will subscribe to any program that we submit.

Under this arrangement, 7 of the 11 directors are Byllesby men. Furthermore, of the 7 directors that reside in San Francisco 4, are Byllesby men.

I have assumed that you desire to re-elect Mr. Rosenthal to the directorate. If you decide otherwise, I would

(5)

then recommend A. M. Dahler, treasurer of Market St. Ry. Co. in his stead.

Please answer by wire, at your convenience, addressing me at my San Francisco office.

Sincerely yours,

SAMUEL KAHN.

(Note—The foregoing letter was written in long-hand on 5 pages, each bearing the caption of Donner Lake Camp with its address.)

Part of Stockholders' Committee Exhibit 58.

July 12, 1926.

Mason B. Starring,
New York Office.

Thanks very much for your wire regarding adjourned Annual Meeting of Market Street Railway set for July fourteenth. Won't you please telegraph Kahn to adjourn meeting for sufficient time to enable your proxies to arrive there, and at meeting, we desire the following Directors elected:

Moritz Rosenthal,
M. B. Starring
M. McCants
G. B. Willcutt
A. W. Foster
J. W. Lilienthal, Jr.,
W. M. Abbott
General Hunter Liggett
Samuel Kahn
Halford Erickson
J. J. O'Brien

Also wish to accept your resignation and for the present nobody is to be elected in your place. As you know, I have discussed this with Moritz Rosenthal and we want to hold this position open until we can get to the Coast sometime this Fall and decide if it is wise to have a local man as President. I again want to thank you for calling my attention to the matter.

J. J. O'Brien.

JJOB-MBK

Stockholders' Committee Exhibit 9.

COPY

MARKET STREET RAILWAY COMPANY
58 Sutter Street
San Francisco, 4, California

January 7, 1927.

MR. HALFORD ERICKSON,
Vice President in Charge of Operation
Byllesby Engineering and Management Corpn.,
231 South LaSalle street, Chicago, Ill.

Dear Mr. Erickson:—

Referring to our conference of July 26, 1926, at which time we decided to charge this property $150,000 for management services for the year 1927—do you wish us to begin accruing at that rate, monthly, beginning with January 1927, or do you wish us to charge surplus, after the year 1927 has elapsed, in the above amount?

Very truly yours,

SAMUEL KAHN
Executive Vice President.

SK/AC

Part of Stockholders' Committee Exhibit 58.

MARKET STREET RAILWAY COMPANY
Byllesby Engineering and Management Corporation
Engineers—Managers

Office of
SAMUEL KAHN
President

58 Sutter Street
San Francisco, California

January 13, 1928.

VIA AIR MAIL.

CONFIDENTIAL.

MR. HALFORD ERICKSON,
Vice President in Charge of Operation,
Byllesby Engineering and Management Corporation,
231 South LaSalle street, Chicago, Illinois.

Dear Mr. Erickson:—

As you know, Byllesby Engineering and Management is being paid $150,000 a year by this property for supervision. What do you think of increasing the amount to $200,000 a year to give us an extra $50,000 for certain expenses that will undoubtedly arise this year and next year?

Very truly yours,

SAMUEL KAHN
(Illegible)

SK

Stockholders' Committee Exhibit 15.

COPY

MARKET STREET RAILWAY COMPANY

February 8, 1927.

VIA AIR MAIL.

MR. WILLIAM G. POHL,
Assistant Secretary,
Byllesby Engineering & Management Corporation,
231 South LaSalle street, Chicago, Ill.

Dear Sir:—

This will acknowledge receipt of your letter of February 5th, enclosing bill in the sum of $95,000.00 for supervision for the year 1926.

I note that a management contract for this Company is now in course of preparation and that you expect to forward the same shortly for execution. Our next Directors' meeting is scheduled for Thursday, February 24th, and if you can have it in my hands prior to that time I will see that our Directors act favorably upon it at that meeting.

Very truly yours,

(SGD) SAMUEL KAHN
Executive Vice President.

SK/AC

Stockholders' Committee Exhibit 19.

COPY

BYLLESBY ENGINEERING AND MANAGEMENT CORPORATION
231 South La Salle Street
CHICAGO

February 11, 1927.

Dear Sam:

Straighten me out please on the matter of Supervision. As I understand it you absorb in 1926 $30,000 of the $125,000 fee for that year, leaving $95,000 to be taken up in 1927. Did you have in mind that 1927 would take up this $95,000 plus $150,000 for the year, namely $245,000? Do you think we should bill it monthly or on an annual basis?

Yours very truly,

(SGD) B. W. LYNCH
Vice President

Mr. Samuel Kahn,
Executive Vice President,
Market Street Railway Co.,
58 Sutter Street,
San Francisco, California.

BWL:R

Stockholders' Committee Exhibit 20.

COPY

MARKET STREET RAILWAY COMPANY

AIR MAIL February 14, 1927.

MR. B. W. LYNCH, Vice President,
Byllesby Engineering and Management Corporation
Chicago, Illinois.

Dear Bert:

Answering your letter of February 11th regarding the matter of Supervision Fee, I wish to advise as follows:

(1) As of December 31, 1926, we had ...... $ 29,166.66 accrued for Management Services.

(2) Shortly after the first of this year we received a bill from the Chicago Office for the sum of .... 125,000.00 for Management Services for the year 1926.

(3) Upon receipt of the bill for .... 125,000.00 I suggested to Chicago Office that it bill us but .... 30,000.00 for the year 1926 before we closed the books for the calendar year 1926, and subsequently about a month later—that is about February first—it bill us the remaining .... 95,000.00 for the year 1926, which we could then gracefully charge to Surplus. This program was carried out and had we done otherwise we would have distorted our December operating report by the large charge, which would undoubtedly have caused some unfavorable comment.

(4)	So as the matter now stands, we used the above accrual of	29,166.66
	plus an additional amount of	833.34
	that was charged against Profit & Loss to take care of the said	30,000.00
	bill and the bill for	95,000.00
	has been received and will be charged to Surplus.	
(5)	So as the matter now stands, the	$125,000.00
	Fee for the year 1926 has been satisfied and the Supervision Fee for the year 1927 will be	$150,000.00

I have gone into this matter rather fully in order that you might have the history of the entire matter before you.

Referring to the last question in your letter I think that you should bill the Supervision Fee on a monthly basis so that we may include the same in our monthly operating expenses.

By coincidence I wrote you under date of February 11th and so our letters crossed in the mail.

Very truly yours,

Samuel Kahn
Executive Vice President.

SK-MAL

(Air Mail)

Stockholders' Committee Exhibit 21.

COPY

Postal Telegraph

1927 Feb 15 PM 1 22

CHD95 43 Collect

1X Chicago Ills 15

Samuel Kahn

Executive Vice Pres Market St RR Co

58 Sutter Street

San Francisco Calif

Mr Lynch out of town and will not return until after March First Stop Regarding accrual for depreciation your letter February Eleventh believe we should continue to set this up annually in December Stop The management fee however should be accrued monthly

B F Braheney.

Stockholders' Committee Exhibit 22.

COPY

MARKET STREET RAILWAY COMPANY

February 15, 1927.

MR. B. F. BRAHENEY, General Auditor,

Byllesby Engineering and Management Corporation,

Chicago, Illinois.

My dear Braheney:

Pursuant to your telegram of February 15th, we shall accrue the Management Fee by charging to Operation one-twelfth of $150,000 (the Fee fixed for this property for this year), or $12,500. monthly.

Furthermore, we shall set up the Depreciation annually in December, as heretofore.

Very truly yours,

SAMUEL KAHN
Executive Vice President.

SK-MAL

Part of Stockholders' Committee Exhibit 58.

MARKET STREET RAILWAY COMPANY
Byllesby Engineering and Management Corporation
Engineers-Managers

Office of
SAMUEL KAHN
President

58 Sutter Street
San Francisco, California
March 6, 1928.

VIA AIR MAIL.

MR. HALFORD ERICKSON,
Vice President in Charge of Operation,
Byllesby Engineering and Management Corporation,
231 South LaSalle street, Chicago, Ill.

Dear Mr. Erickson:—

I have your letter of March 3rd, authorizing an increase in the fee of Byllesby Engineering and Management Corporation from $150,000 to $200,000 a year, beginning with this year. Accordingly I have addressed a communication to Mr. Willcutt, Vice President and Secretary, instructing him to put the same into effect, and a copy of that letter is enclosed herewith.

We have already been billed for the months of January and February of this year at the rate of $150,000 per year or $12,500 per month. I would suggest that you send us a corrected bill for the month of February for the sum of $16,666.67 and send us a bill for January for $4,166.67, being the difference between the annual rate of $200,000 and $150,000.

The bill for February was included in Byllesby Engineering and Management Corporation statement #5339, dated February 26, 1928.

Very truly yours,

SAMUEL KAHN

encl.
SK/AC

Record Exhibit

William J. Cogan
Room 514 150 Broadway
New York 7, New York
Rector 2-2972

October 10, 1949

Securities and Exchange Commission
Second and D. Streets, N. W.,
Washington, D. C.

Attention: Mr. Orval L. Dubois, Secretary

Gentlemen:

Re: Market Street Railway Company, et al., (Files 54-169, 4-63 and 68-84)

In response to letter dated October 4th, 1949, I enclose herewith a summary statement of the facts and circumstances I proposes to present, if my application for re-argument is granted, and my reasons for not presenting them before the Commission received the matter for decision.

For the purpose of record, I also formally request a re-argument on the ground that the Commission was not warranted in basing its decision concerning "Cogan" on the colloquy quoted on page 14 of the opinion which sets forth a "thought" not conveyed to any representative of Standard Gas and Electric Co. and only expressed seven months after the settlement was arranged. This opinion is expressed without reference to testimony of George Knourek at pages 771-772 and 828-829 of the Record, in which he testified that he did not know or ask what was meant by the reference to "Retainer" and that he did not consider the remark as connected with the offer of settlement.

This is claimed, particularly in view of the fact that no overt act was charged or even intimated which would support the conclusion that I actually meant to solicit a retainer, or in any manner failed the stockholders I represented in the matter.

Record Exhibit.

I also request re-argument on the ground the Commission is not warranted in awarding a fee to Milton Paulson based upon the references to him in the opinion. According to his own testimony, he contributed nothing before the Commission, while the Commission itself stated to C. C. A. Third Cir. on August 6th, 1947, that at the time of the order for investigation (May 20, 1947), Market Street had admitted over 90% of the amount of the claim, and it was only after the Commission's investigation had commenced (and incidentally; its stay of any payment by Market Street), that Lea Rosen intervened in the District Court proceedings for the purpose of defending against the balance of the claim.

No reference is made in the opinion to the testimony of Milton Paulson that he has never seen Lea Rosen owner of 300 shares of prior preference stock of Market Street whom he represented in this matter, or to his testimony that she agreed in writing to pay expenses.

The Commission sets forth in its opinion that Paulson does not claim any specific amount; although at the oral argument he claimed no specific amount, the record page 880, shows he contended the services for which he sought compensation were worth $75,000 and the record also shows that he asked the representatives of Standard Gas & Electric Co. for a fee of $50,000 before he would go along with the settlement arranged.

I also request re-argument on that part of the opinion concerning the Van Kirk Committee. The opinion states that the Executor of Van Kirk's will wrote stating he would be willing to accept $7500 in lieu of the $25,000 provided for in the plan. What was actually written in the letter referred to was a statement that the Committee would be willing to accept $7500 as a fee if that would facilitate disposition of the matter.

Respectfully submitted,

William J. Cogan.

Record Exhibit.

William J. Cogan
etc.
150 Broadway,
New York 7, N. Y.
Rector 2-2972

October 21, 1949.

Securities and Exchange Commission,
Second and D Streets, N. W.,
Washington, D. C.

Attention: Mr. Orval L. Dubois, Secretary.

Market Street Railway Company v. *Standard Power and Light Corporation*

Gentlemen:

Herewith enclosed is a copy of complaint filed in the United States District Court—New Jersey on October 14, 1949, in an action brought by Charles T. Jones, et als., on behalf of Market Street Railway Company against Standard Power and Light Corporation to recover $270,000 with interest thereon from 1926-1929, which represents unjust enrichment at the expense of Market Street Railway.

My conclusion of the best way to restore the status quo was for Standard Gas and Electric Company to give up most of its profit received from 1930-1935 and for Standard Power and Light Corporation to give up what was "earmarked" as profit to it from 1926-1929.

It seems to me that the settlement arranged with Standard Gas and the action against Standard Power will accomplish that purpose.

The payments received by Standard Power had nothing to do with the overcharge as such for management and represents an entirely different kind of action, as will be apparent to you.

Certainly Standard Gas and Electric Company, as presently constituted could have and presumably has no objection to Market Street recovering its money from Standard Power and Light Corporation.

I recognize that your order in connection with the Standard Gas and Electric Company settlement may reflect the existence of the action against Standard Power and Light Corporation. However my letter is not intended for the purpose.

In March, 1948 when a motion was made to the United States District Court at San Francisco to authorize a proposed settlement of that action, it was limited to just that. At the time, I entered an appearance and requested leave to file an answer at some later date, which seemed satisfactory to the Court. Accordingly I would not expect any complications to arise by reason of the action now under way in New Jersey.

The Commission will understand that I wish to preserve my rights to oppose in whole or in part such order as it makes on the plan of reorganization filed by Market Street Railway Company.

Very truly yours,

William J. Cogan.

Record Exhibit.

MARKET STREET RAILWAY COMPANY

April 6, 1950

VIA AIR MAIL

REGISTERED

RETURN RECEIPT REQUESTED

SECURITIES AND EXCHANGE COMMISSION

425 Second Street, N. W.,

Washington, D. C.

ATTENTION: MR. MYRON ISAACS

Dear Sirs:

The Supplemental Findings and Opinion of the Commission dated March 9, 1950 (Files Numbers 54-169, 4-63 and 68-84) were carefully considered by the Directors of Market Street Railway Company and the Board unanimously adopted a Resolution not approving the amendment to the Amended Plan for Liquidation and Dissolution of Market Street Railway Company. A certified copy of the Resolution is enclosed herewith.

Very truly yours,

SAMUEL KAHN,
President.

ENCL
SK:AK

Record Exhibit.

On motion of Director Scott, duly seconded by Director Appel, the following resolution was unanimously adopted:

Resolved: That unless it should hereafter appear to the satisfaction of this Board that other or different action should be taken in respect thereto, in view of the night letter of William J. Cogan, Counsel for Prior Preference Stockholders' Committee, dated March 12, 1950, addressed to Samuel Kahn, President, the amendment to the Amended Plan for Liquidation and Dissolution of Market Street Railway Company proposed in the Supplemental Findings and Opinion of the Securities and Exchange Commission dated March 9, 1950 is not approved.

I, James J. Adams, Secretary of the Market Street Railway Company, hereby certify the above and foregoing to be a full, true and correct copy of a resolution adopted by the Board of Directors of said corporation at a meeting thereof held on March 30, 1950; that there was then and there present and voted thereon a quorum of said Board of Directors; and that said resolution is in full force and effect.

In witness whereof, I have hereunto set my hand and affixed the seal of said Corporation, this 4th day of April, 1950.

James J. Adams,
Secretary.

Seal.

Stockholders' Committee Exhibit No. 57.

PUBLIC UTILITY ENGINEERING AND SERVICE CORPORATION
Formerly

BYLLESBY ENGINEERING AND MANAGEMENT CORPORATION

A statement of monies paid by Byllesby Engineering and Management Corporation (other than to Standard Gas and Electric Company and/or Standard Power and Light Corporation) to any person or corporation, at any time, representing a participation or interest in any management contract and/or engineering contract, or representing participation in the proceeds thereof:

None, other than to Standard Power and Light Corporation.

Commission Exhibit 79.

STANDARD POWER AND LIGHT CORPORATION

Statement of income received from Market Street Railway Company from 1924 to June 30, 1947

Standard Power and Light Corporation received no income from the securities of Market Street Railway Company during the period in which it owned them. It did, however, receive from Byllesby Engineering and Management Corporation a portion of the supervision fees billed Market Street Railway Company by Byllesby Engineering and Management Corporation, as follows:

Year	Amount
1926	$50.000.00*
1927	60,000.00
1928	80,000.00
1929	80,000.00
	$270,000.00

* Includes $38,000.00 received in 1927.

Commission's Exhibit 66.

STANDARD POWER & LIGHT COMPANY

231 South La Salle St., Chicago, Ill.

I S S U E D

Date 1927	Folio	Certificate Numbers	Prior Prefer-ence Shares	Preferred Shares	Preferred Scrip	Second Preferred Shares	Common Shares
Apr. 26	1743	N.Y. 893/96	......	.....	......	.....	400
Dec. 30	1408	S.F. 105/486	......	38200	......	.....	.....
" "	"	S.F. 01259	......	50	......	.....	.....
" "	1476	S.F. 9/243	......	.....	......	23500	.....
" "	1823	S.F. 45/644	......	.....	......	.....	60000
			......	38250	......	23500	60400

Commission's Exhibit 66.

STANDARD POWER & LIGHT COMPANY
231 South La Salle St., Chicago, Ill.

CANCELLED

Date 1930	Folio	Certificate Numbers	Prior Preference Shares	Preferred Shares	Preferred Scrip	Second Preferred Shares	Common Shares
Jan. 30	421	S.F. 105/486	......	38200	......	.....	.....
" 30	421	S.F. 01259	......	50	......	.....	.....
" 30	400	S.F. 9/243	......	.....	......	23500	.....
" "	411	N.Y. 893/96	......	.....	......	.....	400
" "	"	S.F. 45/644	......	.....	......	.....	60000
			......	38250	......	23500	60400

Commission's Exhibit 77.

STANDARD GAS AND ELECTRIC COMPANY

Statement of income received from Market Street Railway Company from 1924 to June 30, 1947

Year	Description of Income	Amount
1924	....	None
1925	....	None
1926	....	None
1927	....	None
1928	....	None
1929	....	None
1930	....	None
1931	Interest on open account receivable	$ 4,438.52
1932	" " " " "	25,441.54
1933	" " " " "	39,282.76
1934	" " " " "	46,610.29
1935	" " " " "	49,580.29
1936	" " " " "	51,927.85
1937	" " " " "	51,785.96
1938	" " " " "	51,785.96*
1939	" " " " "	4,398.26
1940	....	None
1941	....	None
1942	....	None
1943	....	None
1944	....	None
1945	Interest on open account receivable (applicable to period from 1/24/39 to 10/24/39)	38,733.06
1946	....	None
1947	(to June 30)	None

* Includes $30,362.18 accrued and taken up as income during the period from June to December, 1938, but not received until 1945.

Commission's Exhibit 106.

ANALYSIS OF OPEN ACCOUNT OF MARKET STREET RAILWAY COMPANY
WITH
STANDARD GAS AND ELECTRIC COMPANY

Date	Description	Amount	Total	Balance
CASH ADVANCES:				
Sept. 1931	Cash loaned to Mkt. St. Ry. Co.	$300 000 00		
June 1932	Ditto	250 000 00		
Sept. 1933	"	150 000 00		
Apr. 1935	"	21 000 00		
" "	"	11 000 00		
May 1935	"	10 000 00		
June 1935	"	11 000 00		
July 1935	"	10 000 00		
Aug. 1935	"	11 000 00		
Sept. 1935	"	10 000 00	$784 000 00	
LESS REPAYMENTS BY MKT. ST. RY. CO.:				
Oct. 1933		75 000 00		
Nov. 1933		75 000 00		
Nov. 1945		155 904 76		
	Total Repayments		305 904 76	
	Balance of Unpaid Cash Loans			478 095 24

Commission's Exhibit 106.

MANAGEMENT FEES ASSUMED OR PAID BY STANDARD:			
Dec. 1932 Fees for last half of 1932	81 250 00		
Dec. 1933 Fees for full year of 1933	150 000 00		231 250 00
Total			709 345 24
Deduct Miscellaneous Items—a net credit of			2 156 00
Principal amount upon which interest is being charged			707 189 24
INTEREST			
Interest accrued at 6% from 9/25/31 thru 10/20/39		363 984 49	
Less payments:			
Monthly from Oct. 1931 to May 1938	290 490 99		
Jan. 1939	4 398 26		
July 1945	25 000 00		
Nov. 1945	44 095 24		
Total interest paid at 6%		363 984 49	
Balance unpaid at 6%		None	
Interest accrued at 4% from 10/24/39 thru 12/31/46		241 249 77	
Interest accrued at 4% from 12/31/46 thru 5/31/47		11 702 55	
Amount paid at 4%		None	
Balance of 4% interest unpaid			252 952 32
Amount due Standard May 31, 1947			$960 141 56

Commission's Exhibit 82.

Public Utility Engineering and Service Corporation

Statement Setting Forth the Basis for Computing the Profit on Services Rendered to Market Street Railway Co.

Prior to June 1, 1939 no Cost Records were kept by the Service Corporation, therefore, no statement can be made setting forth the basis for computing profit for services rendered to that date. Subsequent to June 1, 1939 all services were rendered at cost.

Commission's Exhibit 83.

Public Utility Engineering and Service Corporation

Statement of the methods used by Byllesby Engineering and Management Corporation (now known as Public Utility Engineering and Service Corporation) in rendering services to Market Street Railway Company.

Under the terms of its agreements with Market Street Railway Company, Byllesby Engineering and Management Corporation managed and supervised the plants, property and operations of Market Street Railway Company. Such services were rendered by the officers and employees of the Service Company. During the period beginning January 1, 1926 to and including the nine months period ending September 30, 1935 Samuel Kahn, Chief Operating Officer of Market Street Railway Company, and whose entire time was devoted to the affairs of that Company, received his entire salary from the Service Company. The salary so paid to Mr. Kahn during that period amounted to the sum of $356,203.51, no part of which was charged

to Market Street Railway Company. During the same period the total amount paid by Market Street Railway Company to the Service Company for management and supervisory fees pursuant to the agreements above referred to, amounted to $1,562,500.00.

Byllesby Engineering and Management Corporation also received from Market Street Railway Company, fees aggregating the sum of $3,845.00 for services rendered during the years of 1926 and 1929, in connection with an appraisal made of the property of Market Street Railway Company.

Since June 1, 1939 Public Utility Engineering and Service Corporation, (formerly known as Byllesby Engineering and Management Corporation) has rendered miscellaneous services to Market Street Railway Company not of a managerial or supervisory character. These services were rendered at cost, the charges to Market Street Railway Company aggregating the sum of — $1,478.04.

No charges were made for the use of the personnel of Market Street Railway Company by Byllesby Engineering and Management Corporation or Public Utility Engineering and Service Corporation.

Record Exhibit.

October 29, 1947

Mr. William J. Cogan
32 Liberty Street
New York 5, New York

Dear Mr. Cogan:

I expect to be in New York next week on several matters of business and would like to have a short visit with you on Tuesday, November 4. Please let me know if Tuesday would be agreeable to you and what time I could see you.

Yours very truly,

G. W. Knourek
Vice President and Treasurer

GWKnourek
vs

Western Union

1947 Oct 30 PM 1 18 (50).
32 Nassau St N. Y.
BOwling Green 9-7009

1947 oct 30 pm 1 09

cv78 pd-chicago ill 30 1138a
mr william j cogan
32 liberty st nyk

my letter yesterday. find now that i cannot be in new york until wednesday. would wednesday be agreeable to you.

g w knourek.

Record Exhibit.

October 30, 1947.

Mr. George W. Knourek,
Vice President and Treasurer,
Standard Gas and Electric Company,
231 South LaSalle Street,
Chicago 4, Illinois.

Dear Mr. Knourek:

In response to your letter and wire, we can arrange for a conference in New York on Wednesday, November 5th, 1947.

Very truly yours,

William J. Cogan.

WJC.as.

Standard Gas and Electric Company
231 South La Salle Street
Chicago 4, Ill.

November 5, 1947.

Mr. W. J. Maloney, Secretary,
Standard Gas and Electric Company,
Suite 6-S,
Waldorf-Astoria Hotel,
Park Avenue and 50th Street,
New York City.

Dear Mr. Maloney:

This A. M. Mr. George Knourek, in conference with me and Mr. Harold Reynolds of your legal staff, submitted an offer of settlement of the Market Street Railway Company matter.

Record Exhibit.

This P. M. I gave him by telephone the terms of the best settlement acceptable to the Committee of prior preference stockholders, which are set forth as follows:

As part of any settlement the Committee wishes to be assured of electing a majority of directors to represent them in the course of the continued liquidation of Market Street Railway Company;

The Committee is willing that Market Street Railway Company pay to Standard Gas and Electric Company the sum of $550,000. in full liquidation of the open account provided that Standard will pay to me the sum of $25,000. and to the Committee the sum of $12,500. from said sum, to represent one-half of the fees we propose to charge and upon the assumption and condition that Market Street Railway Company will pay a like sum to each;

The offer is dependent upon authorization by the Securities and Exchange Commission of the above proposed settlement in accordance with the terms set forth and in the event the Commission does not authorize such settlement, I wish it understood that the offer of settlement is made without prejudice to any and all other rights the Committee and the prior preference stockholders it represents may have in the matter.

I assume that you will indicate to me the decision of the Board within the next few days and, in the event the offer is not accepted, I shall expect the matter to continue its normal progress.

Very truly yours,

William J. Cogan
Attorney for Russell M. Van Kirk et als.,
Prior Preference Stockholders Committee
of Market Street Railway Company.

WJC.as.

Record Exhibit.

November 10, 1947

Mr. W. J. Maloney, Secretary
Standard Gas and Electric Company
231 South LaSalle Street
Chicago, Illinois

Dear Mr. Maloney:

On November 5th, 1947, at the request of Messrs. Knourek and Reynolds, I stated to you in writing an offer to settle the Market Street Railway Company matter for consideration by your Board of Directors on November 6th.

The offer was intended for that sole purpose and the figure stated does not represent a continuing offer.

Accordingly, unless Standard chooses to settle on the basis offered on or before November 15th, 1947, you are hereby notified that such offer is withdrawn as of November 15th, 1947.

Very truly yours,

William J. Cogan

WJC.as

Air Mail—
Registered Mail

Record Exhibit.

December 4, 1947

Mr. George Knourek
Vice President, Standard Gas and Electric Company
231 South LaSalle Street
Chicago, Illinois
(Deliver)

Re: Market Street Railway Company

Dear Mr. Knourek:

This will serve to reinstate the offer of settlement set forth in my letter of November 5, 1947, addressed to Mr. Maloney as a firm offer to be accepted or rejected in writing on Monday, December 8, 1947.

Supplementing said offer and by way of clarifying the proposed commitment of Standard Gas and Electric Company, I am willing that the settlement be conditioned both upon its approval by the Securities and Exchange Commission and by the United States District Court at San Francisco; also, that Standard Gas and Electric Company obligation regarding the selection of a Board of Directors will continue only as long as it continues to own shares of stock of Market Street Railway Company.

Very truly yours,

William J. Cogan
Attorney for
Prior Preference Stockholders Committee,
et al.

WJC.as

Record Exhibit.

STANDARD GAS AND ELECTRIC COMPANY
231 South La Salle Street
Chicago 4, Ill.

December 8, 1947

William J. Cogan, Esq.,
32 Liberty Street
New York, New York

Re: Market Street Railway Company

Dear Mr. Cogan:

This will confirm our telegram to you dated December 5, 1947 accepting the offer made in your letter to us dated November 5, 1947, and your subsequent letter of December 4, 1947 renewing and supplementing such offer, all with respect to the settlement of our claim against Market Street Railway Company of San Francisco, California.

STANDARD GAS AND ELECTRIC COMPANY

By G. W. KNOUREK
G. W. Knourek, Vice President

No. 12716
No. 12813

IN THE

United States Court of Appeals

For the Ninth Circuit

SECURITIES AND EXCHANGE COMMISSION, APPELLANT

vs.

WILLIAM J. COGAN, APPELLEE

WILLIAM J. COGAN, APPELLANT

vs.

SECURITIES AND EXCHANGE COMMISSION, MARKET STREET RAILWAY COMPANY, ET AL., APPELLEES

CHARLES T. JONES, APPELLANT

vs.

SECURITIES AND EXCHANGE COMMISSION, MARKET STREET RAILWAY COMPANY, ET AL., APPELLEES

WILLIAM J. COGAN AND CHARLES T. JONES, APPELLANTS

vs.

SECURITIES AND EXCHANGE COMMISSION, MARKET STREET RAILWAY COMPANY, ET AL., APPELLEES

Brief for Appellee, Market Street Railway Company

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IN THE

United States Court of Appeals

For the Ninth Circuit

No. 12716
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Securities and Exchange Commission, appellant

vs.

William J. Cogan, appellee

William J. Cogan, appellant

vs.

Securities and Exchange Commission, Market Street Railway Company, Standard Gas and Electric Company and Standard Power and Light Corporation, appellees

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Charles T. Jones, appellant

vs.

Securities and Exchange Commission, Market Street Railway Company, Standard Gas and Electric Company and Standard Power and Light Corporation, appellees

---

William J. Cogan and Charles T. Jones, appellants

vs.

Securities and Exchange Commission, Market Street Railway Company, Standard Gas and Electric Company and Standard Power and Light Corporation, appellees

---o---

Brief for Appellee, Market Street Railway Company

There is no purpose in mere repetition of arguments made in briefs previously filed on this appeal.

The opening brief for the Securities and Exchange Commission properly sets forth the facts and the law.

The Approval of the Amendment to the Plan to Include a Release to Standard Power by Market Street Management Was for the Best Interests of All Stockholders.

The brief of Cross-Appellants and Appellants, William J. Cogan and Charles T. Jones, criticizes the action of the new Board of Directors of Market Street Railway Company for adopting the resolution to amend the plan to include a release of Standard Power & Light Corporation on the ground that its action was motivated by personal interest and that the members of the Board of Directors were not interested in the minority stockholders and voted such amendment merely for the purpose of facilitating the disposition of the assets of Market Street Railway Company to the advantage of a small group of stockholders who had acquired most of their stock after the investigatory proceeding had started and held their stock only for speculative purposes, so that it was within the knowledge of the Commission—or it should have been within their knowledge—that such was the fact (Brief, p. 25).

The fallacy of that argument is that the action of the Board was for the benefit of all the stockholders; not for the benefit of a small group of stockholders.

The old Board had been in control of the Company for many years. The Company sold its operating assets to the City of San Francisco more than five years ago. Although the Company has been in the process of liquidation since that time (practically all of its assets were cash or government bonds), it spent several hundred thousand dollars in carrying on its affairs. If the Company had continued for a few years more at the same rate as estab-

lished by the old Board, the assets would have been dissipated and there would have been nothing left to distribute to stockholders.

The new Board immediately cut down all unnecessary expense. It now maintains a small office with one employee. Pursuant to the terms of the order of November 21, 1950, a partial liquidating dividend has been paid to the Prior Preference stockholders of $1,742,775 at the rate of $15 per share.

Such distribution was made not only to the Board members who held stock of the Company, but to all stockholders. By what stretch of the imagination such action can be construed as being for the benefit of a small group of stockholders, without interest in the minority stockholders, is beyond comprehension.

On March 30, 1950, the old Board of Directors, by resolution, refused to adopt the clarifying amendment to the plan to include Standard Power in the release, after receipt of Cogan's telegram dated March 12, 1950 (P. R. 225).

The annual meeting of the stockholders was set for April 26, 1950. Time was short. A holder of 10,000 shares of prior preference stock applied to the S. E. C. for permission to solicit proxies from ten or twelve of the larger stockholders, those holding 500 shares or more. The proxy statement clearly set forth the fact that the proxies were being sought for the express purpose of electing a Board of Directors that would vote for the clarifying amendment to provide for a complete release by Market Street of Standard Gas and its subsidiaries, including Standard Power. Proxies were obtained of more than 54,000 shares of a total outstanding issue of 116,185 shares (P. R. 570-571). Apparently, the business judgment of those who were to be the only distributees of the net assets of Market Street was that their interests would be best served by a liquidation of the Company as expeditiously as possible. Their judgment must be respected. In that sense, they were motivated by personal interest and properly so.

Conclusion.

The order of the court below in No. 12,716, insofar as it finds that the Commission's disapproval of any provision in the plan for counsel fees for William J. Cogan is not supported by substantial evidence, and remands the proceeding to the Commission for the purpose of approving a reasonable allowance for Cogan, should be reversed.

The remaining provisions of the order of the court below in No. 12,716, and the order of the court below in No. 12,813 should be affirmed.

Respectfully submitted,

DOUGLASS NEWMAN,
Attorney for Appellee,
Market Street Railway Company.

No. 12716
No. 12813

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

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vs.

SECURITIES AND EXCHANGE COMMISSION, MARKET STREET RAILWAY COMPANY, ET AL., *Appellees*

BRIEF FOR APPELLEE, STANDARD POWER AND LIGHT CORPORATION

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vs.

SECURITIES AND EXCHANGE COMMISSION, MARKET STREET RAILWAY COMPANY, ET AL., *Appellees*

BRIEF FOR APPELLEE, STANDARD POWER AND LIGHT CORPORATION

Statement of Jurisdiction

This is a consolidation of appeals by appellants, Cogan and Jones, from orders of the United States District

Court for the Northern District of California, Southern Division, dated respectively July 11, 1950 (P.R. 108-13)[1] and November 21, 1950 (R. 2-11), and by the Securities and Exchange Commission ("Commission") from certain portions of the July 11, 1950 order, both of which orders were entered pursuant to Section 11 (e) of the Public Utility Holding Company Act of 1935 (15 U. S. C. 79a, et seq.).

Appellee, Standard Power and Light Corporation ("Standard Power") is concerned only with the appeals by appellants, Cogan and Jones.

The District Court had jurisdiction of the subject matter of the proceedings under Sections 11 (e), 18 (f) and 25 of the Public Utility Holding Company Act of 1935 ("Act").

The jurisdiction of this Court is invoked under 28 U. S. C. 1291 and made applicable by Section 25 of the Public Utility Holding Company Act of 1935.

Statement of the Case

The appeals by Cogan and Jones question the approval by the Commission and the enforcement by orders of the court below, of Market Street Railway Company's ("Market Street") plan for liquidation and dissolution under Section 11 (e) of the Act, particularly with respect to the inclusion in said plan of a release to appellee, Standard Power in connection with a settlement made between Market Street and Standard Gas and Electric Company ("Standard Gas") of Market Street's claim arising out of allegedly fraudulent payments made by Market Street from 1926 to 1935 to Byllesby Engineer-

[1] "P.R." refers to the printed portion and "T.R." to the typewritten portion of the record in No. 12,716. "R" refers to the record in No. 12,813.

ing and Management Corporation ("Byllesby")[2] for management and supervisory services rendered by Byllesby to Market Street[3] and the claim of Standard Gas against Market Street on an open account,[4] on the ground that the settlement did not contemplate a release of Standard Power.

The parties may be identified as follows:

1. Market Street is a subsidiary of Standard Gas[5] and was engaged in the operation of a street railway system in and about the City of San Francisco, California, until September 29, 1944, when it sold its operating properties to the City and County of San Francisco (P.R. 28, 37).

2. Standard Gas is a public utility holding company and, from 1926 to 1930, was the parent of Standard Power and from 1930 has been a subsidiary of Standard Power (P.R. 37, 49).

3. Standard Power is a public utility holding company and, between 1926 and 1930, was a subsidiary of Standard Gas and since 1930 has been the parent of Standard Gas (P.R. 49).

4. Byllesby was a subsidiary of Standard Gas and, during the years 1926 to 1935, rendered management and

---

[2] The name of this corporation was changed in 1935 to Public Utility Engineering and Service Corporation (P.R. 38).

[3] Byllesby rendered management and supervisory services to Market Street from 1926 to 1935, during which period Market Street paid to Byllesby a total of $1,187,500 for such services (P.R. 51-52). During the years 1926 to 1930 Standard Power had received from Byllesby $270,000 out of these payments (P.R. 52-53). Standard Gas received a portion of these fees between 1930 and 1935 (P.R. 53-54).

[4] Market Street was indebted to Standard Gas in the amount of $707,189 on an open account; Market Street had accrued interest on the indebtedness at the rate of 4% and Standard Gas had accrued interest at the rate of 6% so that, as of December 31, 1947; Standard Gas claimed a total of $1,111,494.67 and Market Street admitted to $976,726.63 as of the same date (P.R. 29-30).

[5] Market Street had first come into the Standard system in 1924 and 1925 (P.R. 48).

supervisory services to Market Street, pursuant to agreements made between Byllesby, Standard Gas, Standard Power and Market Street (P.R. 38, 50-51).

5. Appellant, Jones, is the owner of ten shares of Market Street Prior Preference stock out of 116,185 shares outstanding (T.R. 590, P.R. 9).

6. Appellant, Cogan, is an attorney who was retained by Russell M. Van Kirk and others, constituting a Protective Committee for the Prior Preference stock of Market Street ("Van Kirk Committee"),[6] to initiate an investigation by the Commission as to transactions and relationships between Market Street, Byllesby, Standard Gas and its subsidiaries and affiliates for the purpose of ascertaining whether or not Market Street had a claim for alleged fraudulent overcharges made by Byllesby and who acted on behalf of the Van Kirk Committee in such proceedings before the Commission and in the negotiations leading to the settlement included in the Market Street plan and who was denied a fee by the Commission for his services because of his alleged misconduct in connection with such negotiations (P.R. 46, 59, 120-129, 203-205).[7]

In 1941 Standard Gas was directed, by order of the Commission, to dispose of its interests in Market Street (P.R. 37).

In or about 1947, the Van Kirk Committee was organ-

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[6] Cogan was subsequently discharged by the Committee (P.R. 227-228).

[7] The Commission found that Cogan violated his duty to the stockholders whom he represented in soliciting a retainer from Standard Gas during the course of the settlement negotiations (P.R. 59-62).

ized and Cogan was retained to proceed against either Standard Gas, Byllesby, Standard Power or any of them or their respective officers and directors (P.R. 120; T.R. 469).

Pursuant to this retainer and on March 21, 1947 Cogan filed with the Commission a petition requesting, among other things, that the Commission direct an investigation of the matters set forth therein (P.R. 120-129), which consisted of allegations, among other things, that, since 1926, Standard Gas had actually controlled Market Street and had elected its directors and officers and that, in 1927, Standard Gas caused Market Street to enter into a contract with Byllesby for management services and to pay to Byllesby substantial sums thereunder for which Market Street received no benefit, and stating that petitioners proposed to institute an action against Standard Gas "and others," as a consequence of these charges (P.R. 123-24, 127-28).

In a memorandum filed by Cogan with the Commission in support of the aforesaid petition, Cogan stated that Mr. John Morris of the Public Utility Staff of the Commission recommended that the relief sought in the petition be denied and that the Committee's claim be tried in the action then pending in the United States District Court, Northern District of California, Southern Division, wherein Standard Gas was plaintiff and Market Street was defendant, and wherein Standard Gas had brought suit for the moneys due on the open account (P.R. 134, 141-142). Cogan's memorandum sets forth nine specific reasons (P.R. 142-144) why the Commission should take jurisdiction and concludes with a statement as follows:

> "It would moreover be far preferable, if such fraud can be proven, that it be done in the forum which has been deciding the ultimate status of the Standard Gas system and eliminating the bad spots therefrom." (P.R. 144).

The Commission granted the relief sought in Cogan's petition and, in May, 1947, ordered that public investigative hearings be held, pursuant to Sections 11a, 18a and 18b of the Act, with respect to transactions between Market Street, Standard Gas, Byllesby, and affiliated and subsidiary companies, and with respect to charges for management and supervisory services rendered to Market Street (H.C.A. Release No. 7425; P.R. 11) by affiliated companies.

Cogan made an "exhaustive examination" of the records and participated in these hearings extensively (P.R. 174, 203-205). Testimony was taken before the Commission between June and December, 1947 (P.R. 175). As Cogan put it, this proceeding "was equivalent to trying a hard fought case in any court * * *" (P.R. 204).

In or about July, 1947, the Van Kirk Committee filed with the Commission a Declaration, pursuant to Rule U-62, for permission to solicit proxies (P.R. 147-150). The Declaration stated that the "primary claim" made by the Committee is that Market Street paid upwards of $1,000,000 for management fees to Byllesby by reason of the fact that Standard Gas controlled both of said corporations (P.R. 148). A proposed letter to Prior Preference Stockholders was filed with the Commission (P.R. 150-153), which referred to the investigative proceeding ordered by the Commission, and stated that the Committee had no motive in soliciting stockholders' participation other than the desire to present a united front to prevent Standard Gas from taking upwards of $1,000,000 from the Market

Street treasury, and to compel Standard Gas "or any affiliate or subsidiary thereof" to pay to or for the Prior Preference Stockholders an appropriate sum as the evidence may indicate as properly due for moneys improperly paid out by Market Street for "alleged management fees" (P.R. 153).

On September 2, 1947, Cogan requested the issuance of subpoenas duces tecum addressed to Byllesby and to Standard Gas (P.R. 154-157). Apparently, Byllesby had moved to quash the subpoena issued against it and, in Cogan's memorandum in opposition to said motion (P.R. 157-167), he stated that the record before the Commission contained gross figures on receipts by Byllesby for management fees for the period 1919 to 1929, together with such breakdown as was available in 1932, and alleged that the "Standard system" had defrauded Market Street (P.R. 159). In his appendix to his memorandum, Cogan set forth twenty-three specific facts taken from the record and the exhibits in the investigative proceeding (P.R. 163-167), including the statement that Market Street paid to Byllesby $1,565,000 from 1929 to 1935 for alleged management (P.R. 165), and that Byllesby paid to Standard Power from the money it received from Market Street the sum of $270,000 between 1926 and 1929 (P.R. 166).

In January, 1947 Standard Gas had commenced an action in the United States District Court for the Northern District of California, Southern Division, against Market Street to recover the sum of $1,069,063 allegedly due on the open account, together with interest as of that date (P.R. 10, 42). Market Street filed an answer in that action admitting its indebtedness to Standard Gas to the extent of the principal amount due plus some interest (P.R. 10). Lea Rosen, a prior preference stockholder of

Market Street, was granted leave to interevene and did intervene in that action (P.R. 10-11). She was represented by Milton Paulson, who also represented her on the investigative hearings (P.R. 47). This action was not prosecuted pending the investigative proceeding ordered by the Commission in May, 1947 (P.R. 42).

It appeared from the testimony taken on the investigative proceeding before the Commission that there was no dispute as between Market Street and Standard Gas with respect to the principal amount due on the open account (T.R. 97). The only dispute related to the interest rate, Standard Gas having accrued interest at the rate of 6% and Market Street at the rate of 4%, the latter in conformity with an order of the California Railroad Commission (T.R. 97, P.R. 48, 29-30).

The evidence further disclosed that Byllesby had assumed the management of Market Street in November, 1925 and that, in February 1927, had made a contract with Market Street whereby Byllesby undertook to render various services to Market Street for the period from January 1, 1927 to December 31, 1931 (P.R. 50). The contract provided for management and supervisory services consisting of, obtaining personnel, assistance in negotiating contracts and loans, purchase of merchandise at discount, supervision of auditing and accounting, local sales of securities, advertising and publicity, securing insurance and necessary property appraisals, and general availability for any other management matters, and for compensation at the rate of not more than 2½% of Market Street's gross revenues, and not less than $150,000 annually (P.R. 50). This agreement was renewed on January 1, 1932 for a further period of five (5) years, but by mutual consent payments were discontinued on October 1, 1935, shortly after the Public Utility Holding Company Act was passed (P.R. 50).

During the period from 1926 to 1935, Market Street was charged $1,562,500 by Byllesby for management and supervisory fees, of which sum $375,000 was paid to Kahn for his services as President of Market Street, the balance of $1,187,500 being for other services under the contract (P.R. 51-2). Standard Power had been paid the sum of $270,000 by Byllesby during the years 1926 to 1929 inclusive out of the monies received by Byllesby from Market Street during these years (P.R. 52-53). After 1930, when Standard Power became the parent of Standard Gas, Byllesby paid a portion of these fees to Standard Gas for the years 1930 to 1935 inclusive (P.R. 50-51). It appeared from the testimony that Market Street was overcharged by Byllesby but that it is impossible to determine the amount of the overcharge because it is clear that Byllesby had rendered some valuable services (P.R. 55).

One of the chief difficulties encountered by the Commission was the fact that nearly everyone concerned with the transactions, which took place between 1926 and 1935, is dead and those who remain have no present recollection of what occurred, and the records for those years have, in most instances, been destroyed (P.R. 52). Kahn, who served as President of Market Street during this period, testified in the proceeding and "could recall few specific facts and was able to testify only in a general way" (P.R. 52).

During the course of the investigative proceeding, settlement negotiations were undertaken between Cogan on behalf of the Van Kirk Committee and Standard Gas and between Paulson on behalf of Rosen and Standard Gas (P.R. 12). These negotiations led to a settlement in December of 1947, whereby it was agreed, subject to the approval of the Commission and the District Court that

Market Street pay Standard Gas $550,000 and Cogan, as attorney for the Van Kirk Committee, receive $50,000 for his fees, one-half to be paid by Standard Gas and one-half by Market Street, and that the Van Kirk Committee be paid $25,000, one-half by Standard Gas and one-half by Market Street, and that it be reimbursed by Market Street for its expenses in an amount not to exceed $5,000 (P.R. 43).

These provisions of the settlement agreement together with the further provision that Market Street release Standard Gas from all liability "for any cause whatsoever", were incorporated into Market Street's Section 11(e) plan filed with the Commission in or about April, 1948 (P.R. 30-31) and the proceeding on the Market Street Section 11(e) plan was consolidated with the investigative proceeding then pending before the Commission and hearings were had in the consolidated proceeding (P.R. 38).

On September 30, 1949, the Commission rendered its Findings and Opinion (P.R. 35-66) wherein it approved the Market Street plan and the aforesaid settlement as incorporated therein, the approval being conditioned, however, upon the filing of an amendment to the plan, containing, among other things, an omission of any provision for the payment of a fee to Cogan and the reduction of the payment by Market Street to Standard Gas from $550,000 to $512,500 (the net amount of the settlement after deducting the portion of the fees payable by Standard Gas to Cogan and the Van Kirk Committee). The Commission disapproved the payment of any fee to Cogan for his services in connection with the settlement because it found from the testimony that, in negotiating the settlement, he had violated his obligation of undivided loyalty to the stockholders whom he represented in seeking a retainer from Standard Gas (P.R. 59).

On October 11, 1949, Cogan moved for a reargument (T.R. 557) which was later denied (P.R. 89).

On October 14, 1949, Cogan for the first time took the position that Standard Power was not included in the settlement and that he had a separate cause of action against Standard Power, when he caused to be commenced in the United States District Court for the District of New Jersey a derivative stockholders action against Standard Power for the recovery on behalf of Market Street of the sum of $270,000, with interest, together with a reasonable counsel fee (P.R. 73-74). The theory of the law suit was that Standard Power had been unjustly enriched to that extent by its participation in the management fees charged by Byllesby to Market Street for the years 1926 to 1929 (P.R. 73-74). The plaintiffs in that action were appellant, Jones, and the surviving members of the Van Kirk Committee (P.R. 73).[8]

On or about December 8, 1949, Market Street filed its amended Section 11(e) plan in conformity with the Commission's September 30, 1949 Findings and Opinion (P.R. 67-85) and, because of Cogan's newly asserted theory of a separate cause of action against Standard Power and the law suit against Standard Power in New Jersey, the plan contained a provision for the delivery of a release by Market Street to Standard Gas and its subsidiaries "for any cause whatsoever" (P.R. 70, 73-74).

The Commission issued an order to show cause why the amended plan should not be approved (P.R. 19) and, after a hearing thereon, issued its Supplemental Findings and

[8] On April 28, 1950, the surviving members of the Van Kirk Committee, who were plaintiffs in the New Jersey action, wrote to the Commission stating that they had not been consulted prior to Mr. Cogan's filing the complaint against Standard Power in that action and that the Committee would not countenance the use of its name without prior approval. The Committee further stated that it wished to withdraw its name from any legal actions brought in its name and that it approved the Market Street plan pending before the Commission (P.R. 227-228).

Opinion on March 9, 1950 (P.R. 86-94), wherein it reviewed its Findings and Opinion rendered on September 30, 1949, and the record upon which the same was based, and emphasized the fact that it had regarded the settlement as contemplating a final and complete disposition of any and all claims which Market Street might have, arising from the management fees paid to Byllesby during the years 1926 and 1935 (P.R. 91-92),[9] and that the Commission had treated the plan "as one which was offered to

[9] The Commission said:

"Whatever may be the present disagreement between Cogan and Standard Gas as to what each intended in their negotiations and their eventual settlement, their settlement was not accepted by us as a reason for approving the payment by Market Street to Standard Gas in the amount which we indicated in our prior Opinion could be found to be fair and equitable. In view of Cogan's activities we found it necessary in our prior Opinion to state that we were not accepting Cogan's negotiations as an indicium of fairness and pointed out that we had the duty to appraise the proposed payment independently. Thus, in considering the plan, we had before us what constituted, in effect, an offer of settlement made unilaterally by Market Street as the proponent of a plan for its own dissolution. We were required under the circumstances of the case to treat that offer in the framework of the whole record then before us just as if there had been no agreement between stockholders of Market Street and Standard Gas.[3] The record before us embraced not only the hearings on the plan but a public investigation into relationships and transactions between Market Street, Standard Gas and Byllesby Engineering. An important objective of the investigation was the examination and analysis of the service charges paid by Market Street during the entire period of its history as a company in the Standard Gas system. The record establishes that Cogan, who now takes the position that he intended only to settle service charges reflected in the open account after 1930, put into evidence numerous documents and schedules and a mass of correspondence relating to the whole period from 1926 to 1935 and that most of this material was secured by Cogan as a result of subpoenas which we issued at his request. In addition, the service charges during the entire period were the subject of attack by a prior preference stockholder who intervened in an action instituted by Standard Gas against Market Street on the open account claim and who was also a participant in these proceedings. Neither we nor the Court in that action, to which the settlement was presented before the plan was filed, was informed that any participant in the proceedings was reserving the right to make any part of the service charges the subject of independent proceedings. Although the settlement was reached before Standard Gas presented its case, it may nevertheless be noted that, so far as the record covered the point, Standard Gas made no disclaimer of responsibility for any other charges made by Byllesby Engineering, which was a subsidiary of Standard Gas throughout the entire period."

[3] Cf. *North American Light & Power Company, et al.*, —— S.E.C. —— (1947), Holding Company Act Release No. 7514, plan approved and enforced, 74 F. Supp. 317 (D. Del., 1947), affirmed 170 F. 2d 924 (C.A. 3, 1948).

resolve all controversies between Market Street and Standard Gas and its subsidiaries, past and present, including Standard Power as a step in the final winding up and dissolution of Market Street" (P.R. 93-94).

And, to eliminate any possible confusion, the Commission in its March 9, 1950 Supplemental Findings and Opinion required as a further condition to its approval of the Market Street Section 11(e) plan that the plan be further amended "to provide clearly for a complete release of Standard Gas and its subsidiaries, including Standard Power" (P.R. 94).

An amendment conforming to this directive was incorporated into the plan filed by Market Street with the Commission in May, 1950 (P.R. 95-97). After a hearing thereon, the Commission entered its order approving the plan as amended as necessary and appropriate to effectuate the provisions of Section 11(b) of the Act and as a fair and equitable plan thereunder (P.R. 98-102).

The Commission in July 1950, applied to the court below for an order of enforcement of the Market Street plan, as required by the Act (P.R. 7-26) and, after a hearing thereon, the court below entered its order on July 11, 1950, holding that the Commission's Findings and Opinion of September 30, 1949, and its Supplemental Findings and Opinion of March 9, 1950, were supported by substantial evidence and were arrived at in accordance with legal standards, except with respect to the denial of a fee to appellant, Cogan (P.R. 110-111).[8] The court found the Market Street plan fair, equitable and appropriate to effectuate the provisions of Section 11 of the Act, except in so far as it failed to provide for compensation to appellant, Cogan (P.R. 111)[9] and remanded the matter to

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[8 and 9] The Court also reserved decision on the fee of Milton Paulson pending reconsideration by the Commission (P.R. 111).

the Commission to fix an allowance to Cogan and to reconsider the allowance to Paulson (P.R. 111).

On September 1, 1950, Market Street filed with the Commission a modified amended plan in conformity with the order of the District Court (R. 70-78). The plan consisted of two steps, Step One containing the provisions of the plan already approved by the court, and Step Two relating to the Cogan fee denial, the fee to Paulson, and the final liquidation of Market Street (R. 78-99). The Commission approved Step One of the plan and the District Court entered its enforcement order on November 21, 1950 (R. 44-61, 1-11).

This appeal is a consolidation of the separate appeals by Cogan and Jones from the orders of the District Court entered on July 11, 1950 and November 21, 1950 respectively, and the appeal by the Commission from certain portions of the order of July 11, 1950 (R. 104-7).

Comments on Brief of Appellants, Cogan and Jones

The brief of appellants, Cogan and Jones, contains very few record references. It is difficult, and in many instances impossible, to verify the statements of fact in appellants' brief by reference to the record. Some statements of fact made in the brief do not appear to be contained in the record. It is, therefore, respectfully urged that the counterstatement of the case contained in appellants' said brief be in all respects disregarded by this Court.

SUMMARY OF ARGUMENT

1. The sole basis of objection by Cogan to the Market Street Section 11(e) plan and the inclusion therein of a release to Standard Power is the denial to Cogan of a fee.

2. Cogan's action against Standard Power in New Jersey was an attempt to compel payment of the fee denied him by the Commission and his contention that the settlement did not contemplate the inclusion of Market Street's claim against Standard Power has no other basis.

3. The Commission's determination with respect to the scope of the settlement and its desirability in connection with the Market Street 11(e) plan is properly supported by evidence and should not be disturbed by this Court.

4. The settlement, as incorporated in the Market Street plan and approved by the Commission and the court below, is supported by substantial evidence.

5. Adequate review was had in the court below.

6. The orders of the court below in so far as the same are appealed from by Cogan and Jones should be in all respects affirmed.

POINT I

The sole basis of objection by Cogan to the Market Street plan and the inclusion therein of a release to Standard Power is the denial to Cogan of a fee.

It may reasonably be inferred that the only reason for the Cogan and Jones appeals is the fact that the Commission has appealed from that part of the District Court's order of July 11, 1950, which remanded the matter to the Commission to fix an allowance to Cogan. It is doubtful that Cogan would have appealed if the Commission had not so appealed.[10] Cogan is interested in a fee for his services in connection with the settlement and his objection to the Market Street plan stems entirely from the denial to him of this fee. In his argument in the enforcement proceeding in the District Court in July 1950, he said (T.R. 594):

> "Oh, well, when I talk about the compromise settlement I am talking about them denying me a fee."

In the proceeding on the return of the Commission's order to show cause why the Market Street plan as amended should not be approved, Cogan stated that he objected to the plan, "only in so far as my request for a fee is involved in the total" (T.R. 430). Again, in the same proceeding, Cogan stated his position unequivocally (T.R. 433):

> "I say that the amended plan is not fair in that it fails to provide a fee or compensation to me for beneficial services rendered to Market Street Railway Company."

[10] The Commission's notice of appeal from the order of July 11, 1950 was filed on August 7, 1950 (P.R. 114). Cogan's notice of appeal was filed on September 7, 1950 (P.R. 115) and Jones' on September 15, 1950 (P.R. 119).

It is a fair statement that these appeals by Cogan and Jones are before this Court only because Cogan was denied a fee and the Commission has appealed from that portion of the July 11, 1950 order which remanded the proceeding to the Commission to fix a fee for Cogan.

POINT II

Cogan's action against Standard Power in New Jersey was an attempt to compel payment of the fee denied him by the Commission and his contention that the settlement did not contemplate the inclusion of Market Street's claim against Standard Power has no other basis.

At no point during the settlement negotiations or in the proceedings before the Commission did Cogan even intimate that he intended to exclude Market Street's claim against Standard Power from the settlement until he was denied a fee by the Commission (T.R. 557). Almost immediately after the fee denial, he caused the action in New Jersey to be commenced against Standard Power (T.R. 557) and he has since sought to support the position that the settlement did not contemplate the inclusion of Standard Power. The record, and particularly Cogan's own statements in the record, do not support him.

Cogan testified before the Commission that the original authorization from the Van Kirk Committee authorized him to proceed with any action he saw fit to institute against Standard Gas, Standard Power and Byllesby (T.R. 469).

The petition filed by Cogan on behalf of the Van Kirk Committee with the Commission (P.R. 120-129), which resulted in the investigative proceeding refers specifically to possible claims of Market Street arising out of allegedly

exorbitant payments made by Market Street to Byllesby for management services for the years 1926 to 1932 (P.R. 123).[11] It is apparent that Cogan's only reason for initiating this proceeding was to determine whether or not Market Street had a claim or cause of action arising out of the Byllesby arrangement. If it were found that such a claim did exist, Cogan was authorized to bring such proceedings as he might deem necessary against such party or parties as he thought advisable to enforce the claim (T.R. 469). Cogan and his Committee were solely and exclusively concerned with a claim or cause of action on behalf of Market Street.

The Commission's notice of and order for hearing, pursuant to the Act, directed that inquiry be made into and evidence be taken concerning the relationship, past and present, between Market Street and its associated and affiliated companies and the facts and circumstances concerning the management fees paid by Market Street to Byllesby (T.R. 522, P.R. 38).

At the inception of the investigative proceeding, there was no misunderstanding between the Commission and Cogan as to its scope and indeed this unanimity of understanding continued until Cogan was denied a fee by the Commission.

Cogan in his argument on the Commission hearing on the amended plan stated (T.R. 435):

> "The record of investigation before the SEC showed that H. M. Byllesby & Company acquired an interest in Market Street Railway Company in November 1925, and was instrumental in diverting to Standard Power & Light Corporation the profits resulting from management fees to be charged

[11] The Commission's investigation covered payments made from 1926 to 1935, the entire period (P.R. 50-51). Standard Power received a total of $270,000 from Byllesby during the years 1926 to 1929 inclusive (P.R. 52-53).

> against Market Street Railway Company by Byllesby Engineering and Management Corporation, and that between 1926 and 1929, inclusive, Standard Power and Light Corporation received a total sum of $270,000 as such profits."

Cogan agreed with the statement of fact in the Commission's Findings and Opinion of September 30, 1949 that, "considerable testimony was taken and documentary evidence adduced with respect to the relationship and transactions between Market Street Railway Company and Standard and its affiliates, past and present, and particularly, the services rendered to Market Street by Byllesby Engineering and creation and history of the open account were explored" (T.R. 443-444).

Thus there was no disagreement as to the scope of the investigative proceedings before the Commission. The Commission was concerned with, and Cogan was interested in, a possible claim on behalf of Market Street arising out of the payment of management fees to Byllesby.

The settlement negotiations between Cogan on behalf of the Van Kirk Committee and the representatives of Standard Gas were undertaken and concluded before the pending investigative proceedings were terminated and before Standard Gas had offered evidence as to the value of the services rendered by Byllesby (P.R. 177-178). The claims which were the subject of discussion and negotiation were (1) Market Street's claim arising out of the Byllesby management arrangement, and (2) Standard Gas' claim on the open account (P.R. 169, 171). Standard Gas' claim was against Market Street exclusively (P.R. 41-42, 169). Market Street's claim was against Byllesby who had rendered the services and charged the fees, and Standard Gas and Standard Power who had each received from Byllesby a portion of the fees charged (P.R. 49-53, 171). Market Street's claim was a single indivisible claim. Cogan's attempt to render it divisible and to segregate

a separate claim for Market Street against Standard Power is clearly a rationalization after the fact. This view is supported by his own admissions that the settlement negotiations covered the relationship back to 1926 and therefore the period when Standard Power participated in the fees charged by Byllesby (T.R. 438, 467).

In Cogan's argument on the Commission's hearing on the amended plan, he stated that he had not before disclosed his intention to bring suit against Standard Power because he was afraid that Milton Paulson might bring a similar suit (T.R. 440). He entertained some doubt himself as to whether he exercised good judgment in not making this disclosure (T.R. 440).

Cogan's position was that he had the Standard Power action "up my sleeve" (T.R. 725). His counsel on the argument of the enforcement proceeding in the District Court in July 1950, contended that Cogan was under no duty to disclose during the settlement negotiations that he did not intend the inclusion of Market Street's claim as against Standard Power and that his silence in this respect was entirely proper (T.R. 637-640).

The District Judge properly characterized as a "tricky deal" Cogan's attempt to exclude Standard Power from the settlement (T.R. 741).

It is quite apparent that Standard Power was included in the settlement negotiations and the settlement itself. Cogan himself stated that he discovered his cause of action against Standard Power while the investigative proceeding and the settlement negotiations were in progress (T.R. 409). He admitted that the settlement discussions with Standard Gas were concerned with overcharges to Market Street from 1926 to 1935 (T.R. 727). Mr. Appel, Vice President of Market Street (T.R. 392) testified that the settlement negotiations covered Market

Street's claim for management fees paid by Market Street from 1926 to 1935 (T.R. 393) and that the settlement contemplated a complete release of this claim (T.R. 394) including a release to Standard Power (T.R. 398). This was certainly Standard Gas' impression throughout the settlement negotiations (T.R. 474-475).

It is quite apparent that, if the New Jersey action is to survive, the settlement must fall; both cannot exist (T.R. 524). Market Street had one not two claims.

Cogan's position is a difficult one as far as Cogan is concerned. He wants a fee. If this Court sustains the Commission's appeal, he will be denied a fee. He, therefore, wants to preserve his action against Standard Power in order to keep alive the possibility of getting a fee through the medium of that action. In order to do this, he must admit his own lack of good faith in the settlement negotiations. There is obvious personal reluctance to make such an admission; therefore, he must deny the record as he has done and rely on the bare argument, unsupported by any facts, that Standard Power was not included in the settlement. He must recant his own many statements to the contrary in the record. His entire position is an anomalous one. As the District Judge pointed out, there is a patent inconsistency in Cogan's request for a fee for negotiating a settlement which he now disavows (T.R. 597).

Cogan's position is simply stated as follows: If the Market Street plan, which includes the settlement and a release to Standard Power, is approved, he is entitled to a fee; if he is not to get a fee, the plan should not be approved.

Thus it is quite clear that Cogan's sole grievance is that he has been denied a fee and the only purpose of the New Jersey action against Standard Power is to compel the payment of a fee.

POINT III

The Commission's determination with respect to the scope of the settlement and its desirability in connection with the Market Street 11(e) plan is properly supported by evidence and should not be disturbed by this court.

The petition, which resulted in the Commission's order directing an investigation into the Byllesby-Standard relationship, charged fraud on the part of these two companies, consisting of alleged exorbitant overcharges in management fees to Market Street (P.R. 120-129). The inquiry, as requested by the petition, concerned itself with management fees paid by Market Street to Byllesby from 1926 to 1935 (P.R. 123-124). Evidence was taken by the Commission in connection with these charges (P.R. 38, 175). It is therefore evident that in the investigative proceeding, the Commission was exclusively concerned with the determination as to whether Market Street was fraudulently overcharged by Byllesby for management services rendered Market Street from 1926 to 1935. It is likewise evident that this investigation was sought by Cogan and his Committee and ordered by the Commission for the purpose of determining whether Market Street had a claim as a result of these overcharges (P.R. 120-129). If Market Street was found to have a claim, it was apparent that such claim was against Byllesby, the immediate recipient of the payments, and possibly against Standard Gas and Standard Power for their respective participations in the overcharges.[12]

[12] Standard Power from 1926 to 1930; Standard Gas from 1930 to 1935 (P.R. 50-53).

These facts which are fully discussed in the Commission's Findings and Opinion of September 30, 1949 (P.R. 46-57) and its Supplemental Findings and Opinion of March 9, 1950 (P.R. 86-94), furnish in abundance the evidentiary basis for the Commission's determination that the settlement negotiations contemplated a settlement of Market Street's entire claim resulting from the Byllesby overcharges and a discharge of liability on the part of those who participated in the proceeds. This of necessity included Standard Power. Under the decisions, this determination should not be disturbed.

In *Mississippi Valley Barge Line Co.* v. *U. S.*, 292 U. S. 282, 287, 78 L. ed. 1260, 1265, the court, in connection with a determination of the Interstate Commerce Commission, said:

> "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."

See also:

> *Virginia Stage Lines, Inc.* v. *U. S.*, 48 F. Supp. 79, 82 (Dist. Ct., W. D. Va., 1942);
> *Nat. Lab. Rel. Bd.* v. *Nevada Consol. Copper Corp.*, 316 U. S. 105, 106-107, 86 L. ed. 1305, 1307;
> *Rochester Telephone Corp.* v. *U. S.*, 307 U. S. 125, 139-140, 83 L. ed. 1147, 1157-1158;
> *Alton R. Co.* v. *U. S.*, 315 U. S. 15, 86 L. ed. 586.

The courts recognize that administrative bodies such as the Commission are charged with the responsibility and possess the technical skills and facilities for consideration and evaluation of the technical and complicated problems within their jurisdictional sphere. The courts have, there-

fore, properly given great weight to their determinations and are reluctant to disturb them in the absence of evident dereliction. *Conway* v. *Silesian-American Corp.,* 186 F. 2d 201, 202 (C.C.A. 2, 1950). The observations of that court are peculiarly applicable to the settlement here:

> "Since decision here is so highly a matter of judgment, indeed of shrewd appraisal of what may be the possibilities of lengthy litigation as against an immediate smaller payment in hand, we obviously cannot find any sure or pat answer."

In *Gray* v. *Powell,* 314 U. S. 402, 412, 86 L. ed. 301, 310, the court said:

> "It is not the province of a court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact-finding bodies deprived of the advantages of prompt and definite action."

As stated by the court in *Virginia Stage Lines Inc.* v. *U. S.,* 48 F. Supp. 79, 83 (*supra*), in referring to the Interstate Commerce Commission:

> "The function of 'weighing' the evidence, therefore, remains peculiarly one for the Commission 'appointed by law and informed by experience', and not for the courts. Alton Railroad Company *v.* United States, 315 U. S. 15, 62 S. Ct. 432, 86 L. Ed. 586; Gray *v.* Powell, 314 U. S. 402, 62 S. Ct. 326, 86 L. Ed. 301."

See also: *Finn* v. *Childs Co.,* 181 F. 2nd 431 (C.C.A. 2, 1950).

There is no basis in the record before this court for disturbing the Market Street Section 11(e) plan which was approved by the Commission and the District Court.

POINT IV

The settlement, as incorporated in the Market Street plan and approved by the Commission and the court below, is supported by substantial evidence.

The basis for appellants' objection to the Market Street plan as amended is, that the approval by the Commission of the inclusion of Standard Power in the Market Street release under the settlement agreement is not supported by substantial evidence. The record of proceedings before the Commission indicates quite clearly the extent of the evidence adduced in the investigative proceeding, which evidence brought into the record such facts as are available at the present time relating to the Market Street-Byllesby arrangement (P.R. 46-53). The record indicates quite clearly both from the evidence before the Commission and the details of Cogan's participation in the investigative proceedings, and the settlement negotiations, that the claim or cause of action as far as Market Street was concerned consisted of a single claim against Byllesby and, possibly, against those corporations which controlled Byllesby, namely Standard Gas and Standard Power. The Commission summed up the situation in its Supplemental Findings and Opinion, rendered on May 9, 1950 (P.R. 91-92):

> "* * * Thus, in considering the plan, we had before us what constituted, in effect, an offer of settlement made unilaterally by Market Street as the proponent of a plan for its own dissolution. We were required under the circumstances of the case to treat that offer in the framework of the whole record then before us just as if there had been no agreement between stockholders of Market Street

> and Standard Gas. The record before us embraced not only the hearings on the plan but a public investigation into relationships and transactions between Market Street, Standard Gas and Byllesby Engineering. An important objective of the investigation was the examination and analysis of the service charges paid by Market Street during the entire period of its history as a company in the Standard Gas system. The record establishes that Cogan, who now takes the position that he intended only to settle service charges reflected in the open account after 1930, put into evidence numerous documents and schedules and a mass of correspondence relating to the whole period from 1926 to 1935 and that most of this material was secured by Cogan as a result of subpoenas which we issued at his request."

As the Commission further stated, neither the Commission nor the California Court, where the Standard Gas action against Market Street was pending, were informed that any party to the settlement agreement had reserved the right to make "any part of the service charges the subject of independent proceedings" (P.R. 92).

It is significant that on the hearing before the Commission on the Market Street plan, which incorporated the settlement, there was no objection until the Commission rendered its decision denying Cogan a fee.[13] From this point on, the only objections to the Market Street plan, the amendments to which included clarifying provisions suggested by the Commission to eliminate any possible doubt as to the scope of the settlement and the parties to be released, were made by Cogan and these objections stemmed quite clearly from the fact that he had been denied a fee (T.R. 430, 433).

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[13] Cogan sought approval of the Market Street plan before the Commission and approval of the settlement of the action pending in California (P.R. 168-179).

On the basis of the record before it, and there was no complaint by any party that the record was insufficient, the Commission properly concluded that the reduction of Market Street's indebtedness to Standard Gas and a complete release by Market Street to all of the parties directly or indirectly concerned with the Byllesby payments constituted a fair and equitable settlement and disposition of all existing claims (P.R. 86-94).

The settlement of claims is a recognized reorganization technique and the Commission would be deprived of the means of fulfilling its obligations if it were prevented from determining that complex claims be disposed of through settlement rather than "through long drawn out litigation, of which indefiniteness is an inherently detracting factor." *North American Light & Power Co.,* 170 F. 2d 924, 932 (C. C. A. 3, 1948); *Conway* v. *Silesian-American Corporation,* 186 F. 2d 201 (C. C. A. 2, 1950).

The Commission cannot be required to go through the motions of "adjudicating the very subject of the settlement" and the Commission's determination in this instance that the settlement, as reflected in the Market Street plan, as finally amended, was for the best interests of the parties, constitutes its ultimate findings and represents "a judgment based upon the consideration of all the imponderables involved in determining whether the proposed offer met the requirements of being fair, reasonable and adequate."[14] *North American Light & Power Co.,* 170 F. 2d 924, 931, *supra.*

It was not the function of the Commission or of the court below to try the issues raised in the complaint in the New Jersey action against Standard Power. *Ladd*

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[14] The Commission stated that all parties recognized that, "prompt disposition was valuable in preventing the frittering away of the assets of this unproductive enterprise" (P.R. 56). Cogan regarded prompt liquidation of Market Street as being in the best interests of the stockholders (P.R. 178, 196).

v. *Brickley,* 158 F. 2d 212, 221 (C.C.A. 1, 1946); certiorari denied 330 U. S. 819; *North American Light & Power Co.,* 170 F. 2d 924, 932, *supra.*

Appellants, whose only real objection to the Market Street plan, as approved, is the denial of a fee to Cogan, present a very confused argument in support of their attempt to justify Cogan's newly acquired contention that it was not the intent of the parties to the settlement agreement to include a release to Standard Power as a part of the settlement. In appellants' brief (p. 42) it is argued that a cause of action arose in favor of Market Street against Standard Gas to recover management fees paid by Market Street from 1930 to 1935 in the principal sum of $355,000 and that a similar cause of action arose for the overcharges in management fees during the years 1926 to 1929. Appellants' argument is that Standard Gas is liable for overcharges during 1930 to 1935 because it was then the direct recipient of these overcharges and that Standard Gas was liable for overcharges during 1926 to 1929 because during that period it "shared control" of Standard Power. Appellants' argument, therefore, is that Standard Gas was liable to Market Street for overcharges by Byllesby to Market Street throughout the entire period from 1926 to 1935. Appellants state unequivocally that that is Market Street's cause of action. It is elementary that only one recovery can be had on a single cause of action. Liability thereon may be joint or several or sole but, in no event, can more than one recovery be had. Appellants, recognizing this position as they do in their brief, defeat completely and fully their argument, which is at best merely rationalization, that Market Street had severable causes of action.

Thus, it clearly appears that appellants do not seriously contend that there was an absence of substantial evidence

before the Commission and the Court below to support the amended Market Street Plan, as approved. Appellants' sole quarrel, as far as this case is concerned, is exclusively with the Commission on the question of Cogan's fee and does not concern itself beyond this.

The courts have consistently held that the Commission's jurisdiction over a Section 11(e) reorganization is exclusive. *In re Electric Bond & Share Co.*, 80 F. Supp. 795 (S. D. N. Y. 1946); *In re Standard Power & Light Corp.* 48 F. Supp. 716 (D. C. Del. 1943); *Homewood et al.* v. *Standard Power & Light Corp.*, 55 F. Supp. 100 (D. C., Del. 1944).

POINT V

Adequate review was had in the court below.

The settlement phase of the Market Street Plan was before the District Court on two separate occasions, in July 1950 and November 1950. In the July 1950 enforcement proceeding, the evidentiary facts considered by the Commission in connection with its approval of the plan were elaborately detailed to the court by Mr. Isaacs who appeared for the Commission (T.R. 497-563; 662-712). Appellant Cogan and his counsel similarly detailed the evidentiary facts upon which Cogan and Jones relied in support of their objections to the enforcement of the settlement phase of the plan (T.R. 578-644; 712-735).

The court thus had before it the evidentiary facts relied upon by both sides.

The court rendered an oral decision from the bench at the conclusion of the argument (T.R. 739-745). The court, however, invited the submission of further material by any party to the proceeding (T.R. 744):

> "If any counsel feel they want to submit anything further in connection with the matter that would make any material difference, I wouldn't want to shut any of you off".

Cogan took no exception to the court's decision and expressed no desire to accept the court's invitation for the submission of any further matter which he felt the court should specifically consider. It may fairly be stated that Cogan was satisfied with the result (T.R. 745-746) because of the reversal by the court of the Commission's finding that Cogan was not entitled to a fee. In any event, Cogan, by his conduct in failing to take an exception to the court's decision and in failing to request the court, pursuant to the court's invitation, to reconsider certain phases of the evidence or to request consideration *de novo* of further evidence, has estopped himself from questioning the adequacy of consideration by the court below in connection with the settlement phase of the Market Street plan. The portions of the record hereinabove referred to create no conflict with the decision in *Universal Camera Corp.* v. *National Labor Relations Board,* 19 U. S. L. Week 4160 (U. S. Feb. 26, 1951), U. S. Sup. Ct. L. ed. Adv. Op. Vol. 95—No. 7, p. 304.

There is no substance to Cogan's argument that there was inadequate judicial review by the court below. If, as Cogan argues, there was inadequate judicial review by the court below with respect to the settlement phase of the Market Street plan in the July 1950 enforcement proceeding, he must then admit that there was likewise inadequate judicial review with respect to that part of the plan which denied him a fee. If he is to be held to any measure of consistency, Cogan must then concede that the court below erred for lack of adequate judicial review in determining that he is entitled to a fee, and in remanding the

matter to the Commission to fix his fee, and he must further concede that the Commission's appeal to this court from that portion of the July 11, 1950 order, is proper and should be sustained. It is doubtful that Cogan would make this concession.

This argument by appellants Cogan and Jones, like all of the arguments urged upon this court by said appellants, reflects the difficulty Cogan encounters in attempting to urge disapproval of the Market Street plan as far as the settlement is concerned, and points quite clearly to the conclusion that appellants' Cogan and Jones sole grievance relates to the Cogan fee denial.

CONCLUSION

The orders of the court below, to the extent that the same are appealed from by appellants, Cogan and Jones, should be in all respects affirmed.

Respectfully submitted,

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No. 12716
No. 12813

In the United States Court of Appeals for the Ninth Circuit

SECURITIES AND EXCHANGE COMMISSION, APPELLANT

vs.

WILLIAM J. COGAN, APPELLEE

WILLIAM J. COGAN, APPELLANT

vs.

SECURITIES AND EXCHANGE COMMISSION, MARKET STREET RAILWAY COMPANY, ET AL., APPELLEES

CHARLES T. JONES, APPELLANT

vs.

SECURITIES AND EXCHANGE COMMISSION, MARKET STREET RAILWAY COMPANY, ET AL., APPELLEES

WILLIAM J. COGAN AND CHARLES T. JONES, APPELLANTS

vs.

SECURITIES AND EXCHANGE COMMISSION, MARKET STREET RAILWAY COMPANY, ET AL., APPELLEES

BRIEF FOR APPELLEE STANDARD GAS AND ELECTRIC COMPANY

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June 1, 1951

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BRIEF FOR APPELLEE STANDARD GAS AND ELECTRIC COMPANY

STATEMENT OF THE CASE

The opening brief filed by appellant, Securities and Exchange Commission, (Commission) contains an adequate statement of the case, with appropriate record references, and for that reason appellee, Standard Gas and Electric Company, (Standard Gas) deems it unnecessary to include any counter-statement of the case in this brief.

Standard Gas wishes to take exception, however, to the language used in the Commission's statement of the case (Commission's brief, p. 7) to the effect that Standard Gas' former subsidiary service company, Byllesby Engineering and Management Corporation (Byllesby Engineering)[1] "greatly overcharged" Market Street Railway Company (Market Street) for management services. This statement in the Commission's brief is apparently based upon language used in the Commission's Findings and Opinion of September 30, 1949 (P. R. 35)[2] on the basis of the record in the investigatory proceedings as it then stood, the Commission having pointed out, however, that "the settlement was arrived at during the course of the hearings and that, in presenting it to us, Standard (Standard Gas) stated that, if the settlement should not be approved, it desired to proceed with the investigation and that it had retained independent engineers to study and reconstruct the services

[1] The name of the company was changed in 1935 to Public Utility Engineering and Service Corporation (P. R. 38).

[2] "P. R." refers to the printed portion and "T. R." to the typewritten portion of the record in No. 12,716.

rendered under the management contract" (P. R. 52-53). And appellant William J. Cogan (Cogan) conceded the possibility of Standard Gas recovering, in a suit, more than the amount of its settlement since it is "in a position to offer evidence of value of the services which were rendered" (P. R. 195; and see P. R. 221).

COMMENTS WITH RESPECT TO THE BRIEF OF APPELLANTS, COGAN AND JONES

The opening brief of appellants, Cogan and Jones, contains few, if any, record references for the statements of fact contained therein. It is, therefore, difficult, and in many instances impossible, to verify the statements of fact in that brief by reference to the record. Some statements of fact made in the brief do not appear to be contained in the record. It is accordingly respectfully urged that the counter-statement of the case contained in the Cogan and Jones brief be in all respects disregarded by this Court, and that this Court accept the statements of fact contained in the opening brief for the Commission and in the within brief where, in each instance, record references are furnished for each statement of fact.

ARGUMENT

I

The sole basis of objection by Cogan to the Market Street Plan and the inclusion therein of a release of Standard Power and Light Corporation (Standard Power) is the denial to Cogan of a fee.

It may reasonably be inferred that the only reason for the Cogan and Jones appeals is the fact that the Commission has appealed from that part of the district court's order of July 11, 1950, which remanded the matter to the Commission to fix an allowance to Cogan. It is doubtful that Cogan would have appealed from the orders of the district court if the Commission had not taken its appeal.[3] Cogan is interested in a fee for his services in connection with the settlement, and his objection to the Market Street plan stems entirely from the denial to him of a fee for such services. In his argument in the enforcement proceeding in the district court, he said (T. R. 594):

> "Oh, well, when I talk about the compromise settlement I am talking about them denying me a fee."

In the proceeding on the return of the Commission's order to show cause why the Market Street plan should not be approved, Cogan stated that he objected to the plan, "only in so far as my request for a fee is involved in the total" (T. R. 429). Again, in the same proceeding, Cogan stated his position unequivocally (T. R. 433):

> "I say that the amended plan is not fair in that it

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[3] The Commission's notice of appeal from the order of July 11, 1950 was filed on August 7, 1950 (P. R. 114). Cogan's notice of appeal was filed on September 7, 1950 (P. R. 115) and Jones' on September 15, 1950 (P. R. 119).

fails to provide a fee or compensation to me for beneficial services rendered to Market Street Railway Company."

It is a fair statement that these appeals are before this Court only because Cogan was denied a fee.

II

The contention of appellants, Cogan and Jones, that the settlement of the Market Street open account indebtedness did not include all claims against Standard Gas and Standard Power is wholly unfounded.

Appellants, Cogan and Jones, argue (pp. 20; 26-28 of their brief) that it was not intended that the settlement of the open account indebtedness of Market Street to Standard Gas, which as of June 30, 1948, amounted to $1,132,691 (P. R. 42), and which indebtedness was settled by a payment to Standard Gas of $512,500 (in December of 1950), was to act as a final settlement of all claims of Standard Gas against Market Street, and of all claims of Market Street against Standard Gas and its subsidiaries, past and present, including Standard Power, now the parent of Standard Gas, but formerly a subsidiary of Standard Gas.

Cogan and Jones have asked that this Court find that Standard Gas, a present subsidiary of Standard Power, settled its open account indebtedness claim against Market Street for substantially less than 50¢ on the dollar and gave Market Street a general release, and at the same time permitted the retention by Market Street of a cause of action against Standard Power, all in the face of the directly contrary findings and opinion of the Commission which were approved by the court below (P. R. 93, 94). Such argument is not only fallacious but does violence to all ordinary standards of intelligent thinking.

The Commission issued an order to show cause why the amended Plan should not be approved (P. R. 19) and, after a hearing thereon, issued its Supplemental Findings and Opinion on March 9, 1950 (P. R. 86-94), wherein it reviewed its Findings and Opinion rendered on September 30, 1949, and the record upon which the same was based, and emphasized the fact that it had regarded the settlement as contemplating a final and complete disposition of any and all claims which Market Street might have growing out of the management fees paid to Byllesby Engineering during the year 1926 and 1935 (P. R. 91-92)[4] and that the Commis-

[4] The Commission said:

"Whatever may be the present disagreement between Cogan and Standard Gas as to what each intended in their negotiations and their eventual settlement, their settlement was not accepted by us as a reason for approving the payment by Market Street to Standard Gas in the amount which we indicated in our prior Opinion could be found to be fair and equitable. In view of Cogan's activities we found it necessary in our prior Opinion to state that we were not accepting Cogan's negotiations as an indicium of fairness and pointed out that we had the duty to appraise the proposed payment independently. Thus, in considering the plan, we had before us what constituted, in effect, an offer of settlement made unilaterally by Market Street as the proponent of a plan for its own dissolution. We were required under the circumstances of the case to treat that offer in the framework of the whole record then before us just as if there had been no agreement between stockholders of Market Street and Standard Gas.[3] The record before us embraced not only the hearings on the plan but a public investigation into relationships and transactions between Market Street, Standard Gas and Byllesby Engineering. An important objective of the investigation was the examination and analysis of the service charges paid by Market Street during the entire period of its history as a company in the Standard Gas system. The record

[3] Cf. *North American Light & Power Company, et al.*, ... S. E. C. .... (1947), Holding Company Act Release No. 7514, plan approved and enforced, 74 F. Supp. 317 (D. Del., 1947), affirmed 170 F. 2d 924 (C. A. 3, 1948).

sion had treated the plan "as one which was offered to resolve all controversies between Market Street and Standard Gas and its subsidiaries, past and present, including Standard Power, as a step in the final winding up and dissolution of Market Street * * *" (P. R. 93-94).

And, to eliminate any possible misunderstanding, the Commission in its March 9, 1950 Supplemental Findings and Opinion required as a further condition to its approval of the Market Street Section 11(e) plan that the plan be further amended "to provide clearly for a complete release of Standard Gas and its subsidiaries, including Standard Power" (P. R. 94).

At no point during the settlement negotiations or in the proceedings before the Commission did Cogan even intimate that he intended to exclude Market Street's claim against Standard Power until he was denied a fee by the Commission (T. R. 557). Almost immediately after the

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establishes that Cogan, who now takes the position that he intended only to settle service charges reflected in the open account after 1930, put into evidence numerous documents and schedules and a mass of correspondence relating to the whole period from 1926 to 1935 and that most of this material was secured by Cogan as a result of subpoenas which we issued at his request. In addition, the service charges during the entire period were the subject of attack by a prior preference stockholder who intervened in an action instituted by Standard Gas against Market Street on the open account claim and who was also a participant in these proceedings. Neither we nor the Court in that action, to which the settlement was presented before the plan was filed, was informed that any participant in the proceedings was reserving the right to make any part of the service charges the subject of independent proceedings. Although the settlement was reached before Standard Gas presented its case, it may nevertheless be noted that, so far as the record covered the point, Standard Gas made no disclaimer of responsibility for any other charges made by Byllesby Engineering, which was a subsidiary of Standard Gas throughout the entire period."

fee denial, he caused an action to be commenced against Standard Power in New Jersey (T. R. 557) and he has since sought to support the position that it was not intended that Market Street's claim against Standard Power be included in the settlement. The record, and particularly Cogan's own statements in the record, does not support him.

Cogan testified before the Commission that the original authorization from Van Kirk authorized him to proceed with any action he saw fit to institute against Standard Gas, Standard Power and Byllesby Engineering (T. R. 468).

The petition filed by Cogan on behalf of the Van Kirk Committee with the Commission (P. R. 120-129), which resulted in the investigatory proceeding, refers specifically to possible claims of Market Street arising out of allegedly exorbitant payments made by Market Street to Byllesby Engineering for management services for the years 1926 to 1932 (P. R. 123)[5]. It must be concluded that Cogan's only reason for initiating that proceeding was to determine whether or not Market Street had a claim or cause of action arising out of the Byllesby Engineering arrangement. If it were found that such a claim did exist, Cogan was authorized to bring such proceedings as he might deem necessary against such party or parties as he thought advisable to enforce the claim (T. R. 468). Cogan and his committee were solely and exclusively concerned with a claim or cause of action on behalf of Market Street.

The Commission's notice of and order for hearing, pursuant to the Act[6], direct that inquiry be made into and evi-

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[5] The Commission's investigation covered payments made from 1926 to 1935, the entire period (P. R. 50-51).

[6] Public Utility Holding Company Act of 1935 (15 U. S. C. Sec. 79).

dence be taken concerning the relationship, past and present, between Market Street and its associated and affiliated companies and the facts and circumstances concerning the management fees paid by Market Street to Byllesby Engineering (T. R. 522, P. R. 38).

At the inception of the investigatory proceeding, there was no misunderstanding between the Commission and Cogan as to its scope, and indeed this unanimity of understanding continued until Cogan was denied a fee by the Commission.

Cogan in his argument on the Commission hearing on the amended plan stated (T. R. 434):

> "The record of investigation before the S. E. C. showed that H. M. Byllesby & Company acquired an interest in Market Street Railway Company in November, 1925, and was instrumental in diverting to Standard Power & Light Corporation the profits resulting from management fees to be charged against Market Street Railway Company by Byllesby Engineering and Management Corporation, and that between 1926 and 1929, inclusive, Standard Power and Light Corporation received a total sum of $270,000 as such profits."

Cogan agreed with the statement of fact in the Commission's Findings and Opinion of September 30, 1949 that, "considerable testimony was taken and documentary evidence adduced with respect to the relationship and transactions between Market Street Railway Company and Standard (Standard Gas) and its affiliates, past and present, and particularly, the services rendered to Market Street by Byllesby Engineering and creation and history of the open account were explored" (T. R. 442-443).

Thus there is no disagreement as to the scope of the investigatory proceedings before the Commission. The Commission was concerned with, and Cogan was interested in, a possible claim on behalf of Market Street arising out of the payment of management fees to Byllesby Engineering.

The settlement negotiations between Cogan on behalf of the Van Kirk Committee and the representatives of Standard Gas were undertaken and concluded before the pending investigatory proceedings were terminated (T. R. 21). The claims which were the subject of discussion and negotiation were (1) Market Street's claim arising out of the Byllesby Engineering management arrangement, and (2) Standard Gas' claim on the open account (P. R. 169-171). Standard Gas' claim was against Market Street exclusively (P. R. 41-42; 169). Market Street's claim was against Byllesby Engineering, which had rendered the services and charged the fees, and Standard Gas and Standard Power which had each received a portion of the fees charged by Byllesby Engineering (49-53; 171). Market Street's claim was a single indivisible claim. Cogan's attempt to segregate a separate claim for Market Street against Standard Power is clearly a rationalization after the fact. This is supported by his admissions that the settlement negotiations covered the relationship back to 1926 (T. R. 438, 466).

In Cogan's argument on the Commission's hearing on the amended plan, he stated that he had not before disclosed his intention to bring suit against Standard Power because he was afraid that Milton Paulson might bring a similar suit (T. R. 439). He entertained some doubt himself as to whether he exercised good judgment (T. R. 439).

Cogan's position was that he had the Standard Power action "up my sleeve" (T. R. 725) and, as stated by his counsel on the argument on the enforcement proceeding in the district court, that he was under no duty to disclose during the settlement negotiations that he did not intend the inclusion of Market Street's claim as against Standard Power and that his silence in this respect was entirely proper. (T. R. 637-640).

The court below properly characterized as a "tricky deal" Cogan's apparent attempt to exclude Standard Power from the settlement (T. R. 741).

It is quite apparent that Standard Power was included in the settlement negotiations and the settlement itself. Mr. Appel, Vice President of Market Street (T. R. 392) testified that the settlement negotiations covered Market Street's claim for management fees paid by Market Street from 1926 to 1935 (T. R. 393) and that the settlement contemplated a complete release on this claim (T. R. 393) including a release to Standard Power (T. R. 398). This was certainly Standard Gas' impression throughout the settlement negotiations (T. R. 474).

Cogan's position is a difficult one—as far as Cogan is concerned. He wants a fee. If this Court sustains the Commission's appeal, he will be denied a fee. He, therefore, wants to preserve his action against Standard Power because, if he is able to do so, he will keep alive the opportunity of getting a fee through the medium of that action. In order to do this he must admit his own lack of good faith in the settlement negotiations. There is obvious personal reluctance to make such an admission; therefore, he must deny the record as he has done and rely on the bare argu-

ment, unsupported by any facts, that Standard Power was not included in the settlement. His entire position is an anomalous one. As the court below pointed out, there is a patent inconsistency in Cogan's request for a fee for negotiating a settlement which he now disavows (T. R. 597).

The truth of Cogan's position was clearly stated by himself (T. R. 597): if the Market Street plan, which includes the settlement and a release to Standard Power, is approved, he is entitled to a fee; if he is not to get a fee, the plan should not be approved.

III

The Commission's determination with respect to the scope of the settlement and its desirability in connection with the Market Street Section 11(e) Plan is properly supported by evidence and cannot be disturbed by this Court.

The petition, which resulted in the Commission's order directing an investigation into the Byllesby Engineering-Standard Gas relationship, charges fraud on the part of these two companies, consisting of alleged overcharges in management fees to Market Street (P. R. 124). The inquiry, as requested by the petition, concerned itself with management fees paid by Market Street to Byllesby Engineering from 1926 to 1935 (P. R. 123, 124). Evidence was taken by the Commission in connection with these charges (P. R. 38, 175). It is evident that in the investigatory proceeding, the Commission was primarily concerned with the determination as to whether Market Street was fraudulently overcharged by Byllesby Engineering for management services rendered Market Street from 1926 to 1935. It is likewise evident that this investigation was sought by

Cogan, et al. and ordered by the Commission not for the purpose of seeking a defense to the Standard Gas claim on open account but rather for the purpose of determining whether Market Street had a claim as a result of these overcharges. If Market Street was found to have a claim, it was apparent that such claim was against Byllesby Engineering, the immediate recipient of the payments, and possibly against Standard Gas and Standard Power for their respective participations in the alleged overcharges.[7] The initiating petition in the investigatory proceeding confines its allegation to relationships between Standard Gas and Byllesby Engineering in connection with these charges and properly so, as Standard Gas may be said to be the ultimate beneficiary of the Byllesby Engineering payments throughout the entire period 1926 to 1935 and this, by reason of the fact that Standard Gas was the parent of Standard Power from 1926 to 1930, during which time payments were made by Byllesby Engineering to Standard Power, and the direct recipient from Byllesby Engineering for the years 1930 to 1935.

These facts, together with admissions by appellant, Cogan, throughout the proceeding, furnish in abundance the evidentiary basis for the Commission's determination that the settlement negotiations contemplated a settlement of Market Street's entire claim resulting from the alleged Byllesby Engineering overcharges and a discharge of liability on the part of anyone who is or may be liable on such claim. Under the decisions, this determination cannot be disturbed.

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[7] Standard Power from 1926 to 1930; Standard Gas from 1930 to 1935 (P. R. 50-53).

In *Mississippi Valley Barge L. Co.* v. *U. S.,* 292 U. S. 282, 287, 78 L. Ed. 1260, 1265, the court, in connection with a determination of the Interstate Commerce Commission, said:

> "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."

See also:

Virginia Stage Lines v. *U. S.,* 48 Fed. Supp. 79, 82 (Dist. Ct., W. D. Va., 1942);

Nat. Lab. Rel. Bd. v. *Nevada Consol. Copper Corp.,* 316 U. S. 105, 106-107, 86 L. Ed. 1305, 1307;

Rochester Telephone Corp. v. *U. S.,* 307 U. S. 125, 139-140, 83 L. Ed. 1147, 1157-1158;

Alton R. Co. v. *U. S.,* 315 U. S. 15, 86 L. Ed. 586.

The courts recognize that administrative bodies such as the Commission are charged with the responsibility and possess the technical skills and facilities for consideration and evaluation of the technical and complicated problems within their jurisdictional sphere. The courts have, therefore, properly given great weight to their determinations and are reluctant to disturb them in the absence of evident dereliction. *Conway* v. *Silesian-American Corp.* 186 F. 2d 201, 202 (C. A. 2, 1950). The observations of that court are peculiarly applicable to the settlement here:

> "Since decision here is so highly a matter of judgment, indeed of shrewd appraisal of what may be the possibilities of lengthy litigation as against an immediate smaller payment in hand, we obviously cannot find any sure or pat answer."

In *Gray* v. *Powell,* 314 U. S. 402, 412, 86 L. Ed. 301, 310, the court said:

> "It is not the province of a court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact-finding bodies deprived of the advantages of prompt and definite action."

As stated by the court in *Virginia Stage Lines* v. *U. S.*, 48 Fed. Supp. 79, 83 (*supra*), in referring to the Interstate Commerce Commission:

> "The function of 'weighing' the evidence, therefore, remains peculiarly one for the Commission 'appointed by law and informed by experience,' and not for the courts. *Alton Railroad Company* v. *United States,* 315 U. S. 15, 62 S. Ct. 432, 86 L. Ed. 586; *Gray* v. *Powell,* 314 U. S. 402, 62 S. Ct. 326, 86 L. Ed. 301."

> See also: *Finn* v. *Childs Co.,* 181 F. 2nd 431 (C. A. 2, 1950).

There is no basis in the record before this court for disturbing the Market Street Section 11(e) plan which was approved by the Commission and the District Court.

IV

The settlement, as incorporated in the Market Street Plan and approved by the Commission and the Court below, is supported by substantial evidence.

The basis for the objections of appellants Cogan and Jones to the amended Market Street Plan is that the approval by the Commission of the inclusion of Standard Power in the Market Street release under the settlement agreement is not supported by substantial evidence. The record of proceedings before the Commission indicates quite clearly the extent of the evidence adduced in the investigatory proceedings, which evidence brought into

the record facts available at that time relating to the Market Street-Byllesby Engineering arrangement (P. R. 46-53). The record indicates *quite clearly,* both from the evidence before the Commission and the details of Cogan's participation in the investigatory proceedings, and the settlement negotiations, that the claim or cause of action as far as Market Street was concerned consisted of a single claim against Byllesby Engineering and, possibly, against those corporations which controlled Byllesby Engineering, namely Standard Gas and Standard Power. The Commission summed up the situation in its Supplemental Findings and Opinion, rendered on March 9, 1950 (P. R. 91-92):

> "* * * Thus, in considering the plan, we had before us what constituted, in effect, an offer of settlement made unilaterally by Market Street as the proponent of a plan for its own dissolution. We were required under the circumstances of the case to treat that offer in the framework of the whole record then before us just as if there had been no agreement between stockholders of Market Street and Standard Gas. The record before us embraced not only the hearings on the plan but a public investigation into relationships and transactions between Market Street, Standard Gas and Byllesby Engineering. An important objective of the investigation was the examination and analysis of the service charges paid by Market Street during the entire period of its history as a company in the Standard Gas system. The record establishes that Cogan, who now takes the position that he intended only to settle service charges reflected in the open account after 1930, put into evidence numerous documents and schedules and a mass of correspondence relating to the whole period from 1926 to 1935 and that most of this material was secured by Cogan as a result of subpoenas which we issued at his request."

As the Commission further stated (P. R. 92), neither the Commission nor the court below, where the action of Standard Gas against Market Street was pending, was informed that any party to the settlement agreement had reserved the right to make "any part of the service charges the subject of independent proceedings."

It is significant that on the hearing before the Commission on the Market Street plan, which incorporated the settlement, there was no objection until the Commission rendered its decision denying Cogan a fee.[8] From this point on, the only objections to the Market Street Plan, the amendments to which included clarifying provisions suggested by the Commission to eliminate any possible doubt as to the scope of the settlement and the parties to be released, were made by Cogan and these objections stemmed quite clearly from the fact that he had been denied a fee (T. R. 430, 433).

On the basis of the record before it, and there was no complaint by any party that the record was insufficient, the Commission properly concluded that the reduction of Market Street's indebtedness to Standard Gas and a complete release by Market Street to all of the parties directly or indirectly concerned constituted a fair and equitable settlement and disposition of all existing claims (P. R. 86-94).

The settlement of claims is a recognized reorganization technique and the Commission would be deprived of the means of fulfilling its obligations if it were prevented from determining that complex claims be disposed of

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[8] Cogan sought approval of the Market Street plan before the Commission and approval of the settlement of the action pending in California (P. R. 168-179).

through settlement rather than "through long drawn out litigation, of which indefiniteness is an inherently detracting feature." *North American Light & Power Co.,* 170 Fed. (2) 924, 932 (C. A. 3-1948); *Conway* v. *Silesian-American Corporation* 186 F. 2d 201 (C. A. 2-1950).

The Commission cannot be required to go through the motions of "adjudicating the very subject of the settlement" and the Commission's determination in this instance that the settlement, as reflected in the final amended Market Street Plan, was for the best interests of the parties, constitutes its ultimate findings and represents "a judgment based upon the consideration of all the imponderables involved in determining whether the proposed offer met the requirements of being fair, reasonable and adequate." *North American Light & Power Co.,* 170 Fed. (2) 924, 933, *supra.*

It was not the function of the Commission or of the court below to try the issues raised in the complaint in the New Jersey action against Standard Power. *Ladd* v. *Brickley,* 158 Fed. (2) 212, 221 (C. C. A. 1-1946); certiorari denied 330 U. S. 819; *North American Light & Power Co.,* 170 Fed. (2) 924, 931 *supra.* Appellants, whose only real objection to the Market Street Plan, as approved, is the denial of a fee to Cogan, present a very confused argument in support of their attempt to justify Cogan's newly acquired contention that it was not the intent of the parties to the settlement agreement to include a release to Standard Power as a part of the settlement. In the Cogan and Jones brief (p. 42) it is argued that a cause of action arose in favor of Market Street against Standard Gas to recover management fees paid by Market Street from 1930 to 1935 in the

principal sum of $355,000 and that a similar cause of action arose for the overcharges in management fees during the year 1926 to 1929. Appellants' argument is that Standard Gas is liable for overcharges during 1930 to 1935 because it was then the direct recipient of these overcharges and that Standard Gas was liable for overcharges during 1926 to 1929 because during that period it "shared control" of Standard Power. Appellants' argument, therefore, is that Standard Gas was liable to Market Street for overcharges by Byllesby Engineering to Market Street throughout the entire period from 1926 to 1935. Appellants state unequivocally that that is Market Street's cause of action. It is elementary that only one recovery can be had on a single cause of action. Liability thereon may be joint or several or sole but, in no event, can more than one recovery be had. Appellants, recognizing this position as they do in their brief, defend completely and fully their argument, which is at best merely rationalization, that Market Street had severable causes of action.

Thus, it clearly appears that appellants do not seriously contend that there was an absence of substantial evidence before the Commission and the court below to support the amended Market Street Plan, as approved. Appellants' sole quarrel, as far as this case is concerned, is exclusively with the Commission on the question of Cogan's fee and does not concern itself beyond this.

The courts have consistently held that the Commission's jurisdiction over a Section 11(e) reorganization is exclusive. *In re Electric Bond & Share Co.*, 80 Fed. Sup. 795 (S. D. N. Y. 1946); *In re Standard Power & Light Corp.*

(D. C. Del.), 48 Fed. Sup. 716; *Homewood et al* v. *Standard Power & Light Corp.* (U. S. D. C., Del.) Civil Action No. 229, opinion by Leahy, D. J., rendered April 29, 1944.

V

Adequate review was had in the court below.

The settlement phase of the Market Street plan was before the district court on two separate occasions in July, 1950 and November, 1950. In the July, 1950 enforcement proceedings the evidentiary facts considered by the Commission in connection with its approval of the plan were elaborately detailed to the court by Mr. Isaacs, who appeared for the Commission (T. R. 497-563; 662-712). Appellant Cogan and his counsel similarly detailed the evidentiary facts upon which Cogan and Jones relied in support of their objections to the enforcement of the settlement phase of the plan (T. R. 578-644; 712-735). The court thus had before it the evidentiary facts relied upon by both sides.

The court rendered an oral decision from the bench at the conclusion of the argument (T. R. 739-745). The court, however, invited the submission of further material by any party to the proceedings (T. R. 744):

> "If any counsel feel they want to submit anything further in connection with the matter that would make any material difference, I wouldn't want to shut any of you off."

Cogan took no exception to the court's decision and expressed no desire to accept the court's invitation for the submission of any further material which he felt the court should specifically consider. It may fairly be assumed that

Cogan was satisfied with the result (T. R. 745, 746) because of the reversal by the court of the Commissions' findings that Cogan was not entitled to a fee. In any event Cogan, by his conduct in failing to take an exception to the court's decision, and in failing to request the court—pursuant to the court's invitation to reconsider certain phases of the evidence or to request consideration *de novo* of further evidence—has estopped himself from questioning the adequacy of the consideration by the court below in connection with the settlement phase of the Market Street plan. The portion of the record hereinabove referred to creates no conflict with the decision in *Universal Camera Corp.* v. *National Labor Relations Board,* ... U. S. ...; 95 L. Ed. (Adv.) 304 (1951).

There is no substance to Cogan's argument that there was inadequate judicial review by the court below. If, as Cogan argues, there was inadequate judicial review by the court below with respect to the settlement phase of the Market Street plan in the July, 1950 enforcement proceedings, he must then admit that there was likewise inadequate judicial review with respect to that part of the plan which denied him a fee. If he is to be held to any measure of consistency, Cogan must then concede that the court below was wrong in determining that he is entitled to a fee and in remanding the matter to the Commission to fix his fee, and he must further concede that the Commission's appeal to this Court from that portion of the July 11, 1950 order is proper and should be sustained. It is doubtful that Cogan would make this concession.

This argument by appellants Cogan and Jones, like all of the arguments urged upon this Court by these appel-

lants, reflects the difficulties Cogan encounters in attempting to urge disapproval of the Market Street plan as far as the settlement is concerned, and points quite clearly to the conclusion that the sole grievance of appellants Cogan and Jones relates to the Cogan fee denial.

CONCLUSION

The order of the court below in No. 12,716, in so far as it finds that the Commission's disapproval of any provision in the plan for counsel fees for William J. Cogan is not supported by substantial evidence, and remands the proceeding to the Commission for the purpose of approving a reasonable allowance for Cogan, should be reversed.

The remaining provisions of the order of the court below in No. 12,716, and the order of the court below in No. 12,813 should be affirmed.

Respectfully submitted,

A. Louis Flynn

Helmer Hansen

Attorneys for Appellee,
Standard Gas and Electric Company.

June 1, 1951.

Nos. 12716, 12813

In the United States Court of Appeals for the Ninth Circuit

SECURITIES AND EXCHANGE COMMISSION, APPELLANT

v.

WILLIAM J. COGAN, APPELLEE

WILLIAM J. COGAN, APPELLANT

v.

SECURITIES AND EXCHANGE COMMISSION, MARKET STREET RAILWAY COMPANY ET AL., APPELLEES

CHARLES T. JONES, APPELLANT

v.

SECURITIES AND EXCHANGE COMMISSION, MARKET STREET RAILWAY COMPANY ET AL., APPELLEES

WILLIAM J. COGAN AND CHARLES T. JONES, APPELLANTS

v.

SECURITIES AND EXCHANGE COMMISSION, MARKET STREET RAILWAY COMPANY ET AL., APPELLEES

ANSWERING BRIEF FOR SECURITIES AND EXCHANGE COMMISSION

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William J. Cogan and Charles T. Jones, appellants

v.

Securities and Exchange Commission, Market Street Railway Company, Standard Gas and Electric Company and Standard Power and Light Corporation, appellees

ANSWERING BRIEF FOR SECURITIES AND EXCHANGE COMMISSION

PRELIMINARY STATEMENT

Pursuant to a stipulation of the parties approved by this Court (R. 104–7), we address ourselves in this brief to those contentions in the opening brief for Cogan and Jones (hereinafter referred to as Cogan's brief) which we did not anticipate and answer in our opening brief.[1] First we comment briefly on other aspects of his brief.

1. Cogan's brief does not argue the issue of his fee, as to which he is appellee, although his contentions with respect thereto are stated in his summary of argument (at page 18).[2] Since his argument on the

[1] This stipulation, which was entered into in order to expedite the disposition of the appeals, provides that the opening briefs shall contain the arguments of the parties not only on the questions as to which they are appellants, but also on the questions as to which they are appellees, and that the answering briefs shall contain the arguments of the parties on any question raised in the opening briefs to which the parties have the right to argue in answer or reply. No additional briefs were to be filed without further order of this Court. In accordance with this stipulation, the Commission's opening brief argues the issue of Cogan's fee as to which the Commission is appellant, and also answers the arguments we anticipated would be made by Cogan with respect to the issue of a release for Standard Power as to which Cogan and Jones are appellants (see our opening brief, p. 19, n. 20).

[2] His brief also refers (p. 22) to six letters and a telegram printed in the Appendix to the brief (pp. 106–111) which, it is asserted, "without further proof in the matter" indicate that Cogan "was attempting to serve the best interests of the Prior Preference Stockholders of Market Street * * * at all times." These communications appear under the heading "Record Exhibit" without any precise reference to the record on appeal. While some of these documents were presented to the district court or referred to in argument before the district court (T. R. 610–613), so far as we have been able to ascertain none of them was offered in evidence before the Commission. In any event they clearly do not rebut the specific findings of the Commission that Cogan improperly served conflicting personal interests while purporting to represent the public stockholders of Market Street.

fee issue has been saved for his answering brief, we are unable to reply to it in this brief.

2. The factual statements in Cogan's brief are incomplete, argumentative, and generally are not accompanied by record references. We disagree with Cogan's version of the facts and rely for answer thereto upon the fully documented statement in our opening brief.

3. The summary of argument in Cogan's brief (pp. 17–20) includes other contentions not discussed in his argument proper. Paragraphs (j) and (k) (p. 19) refer separately to a conference between members of the Commission's staff and counsel for Standard Gas and for Market Street after Cogan's letter of October 21, 1949, had advised the Commission that he had started a derivative action against Standard Power (see also pp. 8–9). We are unable to surmise the basis for the contention that the staff members "improperly participated," since it is, of course, the practice, and duty, of the staff of the Division of Public Utilities to confer with the companies subject to regulation and other parties to the proceeding as to appropriate steps to be taken.[3] *Cf. Phillips* v. *S. E. C.,* 153 F. 2d 27, 32 (C. A. 2, 1946), certiorari denied 328 U. S. 860, where the Court, in rejecting a contention that the Commission had made an ex parte adjudication on the basis of a conference between the president of a company in Section 11 (e) reorganization and members of the Commission and its staff, stated:

These conversations seem to us no more than

[3] Cogan refers without criticism to an instance where staff members conferred with him (T. R. 452, 464).

> legitimate prehearing conferences of the kind which the commissioners or their staff must have if all the intricate details involved in even a single holding-company simplification is to be carried to completion within the time of man. Certainly a court would not be justified in interfering with such helpful preliminary conferences to expedite the settlement of details without a very definite showing of prejudice to an aggrieved party or eventual denial of a fair hearing.

See also *In re American & Foreign Power Co., Inc.*, 80 F. Supp. 514, 525 (D. Me., 1948).

ARGUMENT

I

The Commission properly treated the initial plan as settling all controversies between Market Street and Standard Gas and its subsidiaries, including Standard Power, and it properly accepted from the new board of directors of Market Street a suggested amendment to the plan which was consistent with that treatment although the amendment had previously been rejected by the old board

Cogan contends (pp. 20, 22–25) that the Commission was not warranted in treating the initial plan, as the Commission stated in its supplemental findings and opinion of March 9, 1950, just as if there had been no settlement and "as one which was offered to resolve all controversies between Market Street and Standard Gas and its subsidiaries, past and present, including Standard Power, as a step in the final winding up and dissolution of Market Street" (P. R. 91, 93–94). The Commission cited, by way of comparison, *In re North American Light & Power Co.*, 170 F. 2d 924 (C. A. 3, 1948), a Section 11 (e) pro-

ceeding which also involved the settlement of inter-company claims, and Cogan attempts to distinguish that case on the ground of the greater complexity of the claims there involved and on the further ground that, unlike the situation in the instant case, North American was free "to stand or fall upon the original plan" (170 F. 2d at 931).

This argument misses the point of the Commission's reference to the *North American Light and Power* case. In that case the Commission, as in the instant case, assumed from the very existence of the relationship between a parent and a subsidiary holding company that negotiations for the settlement of the inter-company claims were not to be treated as though made at arm's-length. Having rejected the North American plan as originally submitted, the Commission, in furtherance of its affirmative obligation to bring about a simplification of holding company systems "as soon as practicable," undertook to specify what modification of the proposed settlement would be fair and equitable. In the instant case, the whole tenor of Cogan's contentions before the Commission, as well as its own findings, was that Market Street was not in a position to bargain at arm's-length with its parent, Standard Gas, in the settlement of the inter-company claims (see, for example, T. R. 402). Whatever significance might otherwise have attached to the fact that the settlement had been negotiated with Cogan as a representative of the public stockholders was vitiated in the Commission's view by the fact that Cogan had pursued conflicting personal interests. Accordingly, the Commission properly concluded that,

as in the *North American Light & Power* case, it was under an obligation to appraise the fairness of the settlement without giving weight to the fact that those who had negotiated it maintained it to be fair (P. R. 91).

Cogan appears to attach significance to the Commission's failure to regard as conclusive the refusal of the old board of Market Street, after the Standard Power litigation had been instituted, to amend the plan so as to provide clearly for a release of Standard Power. Instead the Commission permitted Graham-Newman Corporation, a large holder of prior preference stock, to solicit proxies for the election of a new board at the next annual meeting for the purpose of reversing the action of the old board, without holding a hearing on the qualifications of the new board to serve the interests of all the prior preference stockholders (see Cogan's Br., p. 25).

There is not the slightest suggestion in the record that Graham-Newman Corporation was in any way affiliated in interest with Standard Power, or that the new board was any less qualified than the old to speak for the public stockholders of Market Street, who had a clear interest in a prompt resolution of its problems in view of the fact that Market Street's assets were then in nonproductive form and were being depleted by expenses.[4] Certainly the Commission was not re-

[4] By contrast, members of the old board had an interest in doing nothing for fear of litigation with Cogan who had sent a night letter to the then president of Market Street advising non-acceptance of the amendment "as being contrary to the interests of Market Street * * * and yourself" (PR. 233; see our opening brief, p. 15, n. 16).

quired to hold a hearing, as Cogan contends (p. 25), to determine whether the new board was "composed of disinterested persons holding office for the purpose of representing the minority stockholders as well as the majority stockholders."[5] There is obviously no impropriety in the solicitation of proxies by a stockholder entitled to share in the residual equity in the company, who does not agree with the action of the board in rejecting a suggested amendment to the plan and wishes the amendment to be approved and the plan, as amended, consummated so that distribution can be made. As stated by the district court in this connection (T. R. 739–40):

> I think the Commission acted in the utmost good faith in making his [sic] supplemental finding, irrespective of the fact how the directors of Market Street Railway Company was composed, what change that was made, or like matters.

In any event, the basic issue presented is not whether the plan or its amendment is the production of arm's-length negotiation but whether it is "fair and equitable." As stated in the *North American*

[5] Cogan refers to a 1944 opinion of the Commission in *Standard Gas and Electric Company*, 16 S. E. C. 85, where the Commission stated that it would consider, with respect to the sale or distribution of Standard Gas' holdings of stock of its subsidiaries "what requirements are to be imposed, with regard to * * * the election of independent directors, in order to insure actual divestment of control of the subsidiaries by Standard in compliance with our Section 11 (b) (1) order." Market Street, however, is being dissolved under the Section 11 (e) plan and therefore there is no problem of preventing control of that company by Standard Gas.

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case (170 F. 2d at 931):

> Assuming that the proffered plan can be rejected without more, there seems to be no basis, in reason or common sense, for refusing to entertain a modification designed to cure the defects discovered by the Commission. It is but another step, and a progressive one at that, for the Commission to state not only the rationale of its rejection of the initial plan, but also to suggest the amendments which in its opinion and discretion would be necessary to bring the plan across the line of acceptability. Such procedure commendably accelerates the business at hand, and that is a consideration not without importance in this type of case. If the plan as amended conforms to the statutory requirements, and opportunity be given interested parties to have their say, we can see no reason for postponing the period of convalescence by prolonging the surgical operation of severing the subsidiary from the parental body.

II

The court below adequately reviewed the record in holding that the Commission's approval of the plan as amended to provide for a release of Standard Gas and its subsidiaries, including Standard Power, is supported by substantial evidence

Cogan asserts (pp. 44–45) that, despite his contention in the court below that the Commission's findings and opinions approving the plan as amended to provide for a release of Standard Power were not supported by substantial evidence, the court "followed a standard of judicial review the Supreme Court has since held to be improper" in *Universal Camera Corporation* v. *N. L. R. B.*, 340 U. S. 474 (1951), and

its companion, *N. L. R. B.* v. *Pittsburgh Steamship Company,* 340 U. S. 498 (1951). These cases applied *inter alia* Section 10 (e) of the Administrative Procedure Act, 60 Stat. 243–244, 5 U. S. C. § 1009 (e), which directs "the reviewing court" to "review the whole record or such portions thereof as may be cited by any party," taking "due account * * * of the rule of prejudicial error."

Cogan's objection is derived exclusively from a remark of the district judge, not objected to at the time, and made after listening to two days of argument, that he did not deem it necessary to examine a trunkful of documents comprising the entire administrative transcript and exhibits (T. R. 739). At that time the judge announced the impression which the argument had left on him to the effect that the plan should be approved (except for his disagreement with the Commission's treatment of Cogan's fee application) and stated (T. R. 744):

> If any counsel feel they want to submit anything further in connection with the matter that would make any material difference, I wouldn't want to shut any of you off.

Cogan made no response to this suggestion other than to inquire whether the case was to be remanded. The court replied "that would be my view of it" and inquired whether "there are some legal problems that have escaped any of us that would require more consideration" (T. R. 745). Cogan then made some suggestions wholly unrelated to the court's treatment of issues of fact. After discussion concerning the submission of a proposed order (T. R. 746–49, 752–53)

the court referred to the bulk of the exhibits tendered, which comprised the entire administrative record, and stated that the clerk "has a natural reluctance to take charge of such a big piece of property as that" and suggested a stipulation for withdrawal (T. R. 753). All parties agreed, including Cogan, who stated: "We can stipulate, your Honor, that material can go back to Washington" (T. R. 753). All this occurred prior to the entry of the first order on appeal. We believe, therefore, that Cogan's objection, first made in his present brief, comes too late.[6] In any event it is clearly lacking in substance.

At the July 6–7, 1950, hearing, the district court had before it the Commission's application for enforcement of the plan and the exhibits attached thereto which, among other things, consisted of the Commission's findings and opinions of September 30, 1949, and March 9, 1950, and the initial and amended plans for the dissolution of Market Street. Statements of objections and briefs in support thereof were submitted to the court by various parties including Cogan. In connection with the issue of a release for Standard Power, Cogan in his brief, and in oral argument before the court (T. R. 584, 715–21), summarized or quoted pertinent portions of various exhibits in the record, and read to the court a short excerpt from the transcript of hearings (T. R. 586–87).

[6] Cogan's excuse for not having raised this point either before the district court or in the statements of points filed in this Court is that he did not anticipate the holding of the Supreme Court. However, the Administrative Procedure Act has been on the statute books since 1946 and the *Pittsburgh Steamship* case was first before the Supreme Court in 1949. 337 U. S. 656.

The administrative record as summarized in the Commission's findings and opinion on the initial plan is typical of Section 11 (e) records in this type of case. It is derived substantially from various books and records which reveal the financial experience of the companies involved and their relationships to each other, as supplemented by the testimony of company officials. The Commission opinions are likewise typical, summarizing comprehensively the most pertinent of the basic facts, analyzing them in the light of the settlement proposed in the plan, and indicating the Commission's own independent conclusions and its underlying rationale.

Cogan had indicated before the Commission that his objections to the Commission's findings, which were more with respect to its conclusions than its factual recital, could be briefly stated (see T. R. 442–453, 458–459). In the brief which Cogan filed in support of his objections, and in his oral argument before the court (T. R. 618), he specifically referred to the transcript of the hearing on the Commission's order to show cause. This appears to be the only portion of the transcript of the hearings specifically cited to the court by Cogan for examination in connection with the issue of a release for Standard Power. Cogan urged that this record would show he had received a "brushoff" (T. R. 618). The purpose of the order to show cause, however, was not to receive additional evidence (although some evidence, cumulative and otherwise, was received by the hearing examiner either over the objections of Division counsel (T. R. 391, 421–22, 459–65; see also

our opening brief, p. 45, note 35) or with the latter's limited approval (T. R. 390–91)).[7] Its purpose was to permit argument on the proposed amendment to the plan providing for a release of Standard Gas' subsidiaries, since this amendment merely fortified the plan against a hitherto undisclosed action and defined the scope of the settlement in accordance with the basic assumption of the Commission in initially approving it.[8] The record was already substantially

[7] The Commission, in its supplemental findings and opinion, noted in this connection (P. R. 93, n. 4):

"At the hearing on the order to show cause, there were placed in evidence the contracts pursuant to which the payments to Standard Power were made by Byllesby Engineering. These contracts have furnished the reason for such payments but have added nothing to what was previously before us as to the effect of the service charges on Market Street and the significance which we gave to the service charges generally."

In addition, Cogan was questioned by Division counsel as to the make-up of the Van Kirk Committee at that time in view of a letter received by the Commission from the Committee a few days before the hearing which, although listing Cogan as "Counsel," announced that the Committee supported the proposed amendment to the plan (T. R. 467–73; see our opening brief, p. 13, n. 13; p. 14, n. 14).

[8] Cogan recognizes (pp. 40–42) that among the alternative causes of action available to Market Street for the recovery of the overcharges paid for services from 1926 through 1929 was one against Standard Gas as well as against Standard Power, Ladenburg Thalmann and Company, and H. M. Byllesby and Company, and he admits (p. 42) "that there can be only one complete satisfaction" of such claim. Thus, Cogan's position is completely consistent with the Commission's approval, after full hearings, of the initial plan which provided for a release only of Standard Gas and which Cogan supported, and buttresses our contention stated in our opening brief (p. 51) that Cogan, in objecting to a release of Standard Power, in effect seeks a double recovery of the overcharges paid over to Standard Power.

complete. As stated by Cogan at the hearing on the order to show cause (T. R. 404):

> I would admit that the record itself, being one of investigation, covers all transactions had between Market Street Railway Company and Standard and its affiliates, in so far as they were presented as evidence.

The following colloquy between Cogan and the hearing examiner (T. R. 423) indicates that Cogan also conceived of the hearing on the order to show cause as not being evidentiary in nature:

> HEARING EXAMINER. Do you want to be sworn?
>
> Mr. COGAN. It is an order to show cause, your Honor. I simply feel that we are called upon to state the reasons why the Amended Plan is not fair and reasonable and should not be accepted.[9]

Cogan's statement of these reasons (T. R. 423–57) was clearly a legal argument. It can hardly be considered as evidence although he later swore generally to the truth of any factual statement he had made.

If it may be surmised that the district judge did not actually refer to these particular pages of transcript, it would be only because he had received the impression from Cogan's argument that nothing relevant was contained therein, other than points which had been adequately developed in the briefs or in the course of the two days of oral argument. Under

[9] After presenting his argument, however, he acceded to the suggestion of the examiner, over objection of Division counsel, that he be sworn as to the truth of the "factual statements" therein (T. R. 457–61).

these circumstances he was not obliged to explore the record for lurking error not specifically adverted to. See *In re Electric Power and Light Corporation,* 176 F. 2d 687 (C. A. 2, 1949).

We believe that there is nothing in the *Universal Camera* case which could have required the district judge to do more than he did. All that the *Universal Camera* case decides is that "Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitively precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record" (340 U. S. at 487–488). It was concluded in consequence "that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function" (340 U. S. at 490). There is not the slightest suggestion in the opinion that either Act imposes upon reviewing courts the novel and impossible procedural burden of exploring administrative records in detail in a search for significant evidence not specifically adverted to by

the agency or the parties seeking to challenge agency action. In any event Cogan cannot complain of a procedural error not urged before the district court.

It is clear that the real challenge by Cogan is not to the basic facts as summarized in the findings of the Commission, but to the Commission's conclusion and judgment based on these facts that the settlement, viewed as covering the entire period from 1926 to 1935, is fair and equitable. We believe that the district court properly held that this conclusion is supported by substantial evidence.

Respectfully submitted.

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June 1951.

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Nos. 12,716 and 12,813

United States Court of Appeals
For the Ninth Circuit

SECURITIES AND EXCHANGE COMMISSION,
Appellant,
vs.
WILLIAM J. COGAN,
Appellee.

WILLIAM J. COGAN,
Appellant,
vs.
SECURITIES AND EXCHANGE COMMISSION, MARKET STREET RAILWAY COMPANY, STANDARD GAS AND ELECTRIC COMPANY and STANDARD POWER AND LIGHT CORPORATION,
Appellees.

CHARLES T. JONES,
Appellant,
vs.
SECURITIES AND EXCHANGE COMMISSION, MARKET STREET RAILWAY COMPANY, STANDARD GAS AND ELECTRIC COMPANY and STANDARD POWER AND LIGHT CORPORATION.
Appellees.

(CONSOLIDATED CASES)

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CLERK

PETITION FOR A REHEARING.

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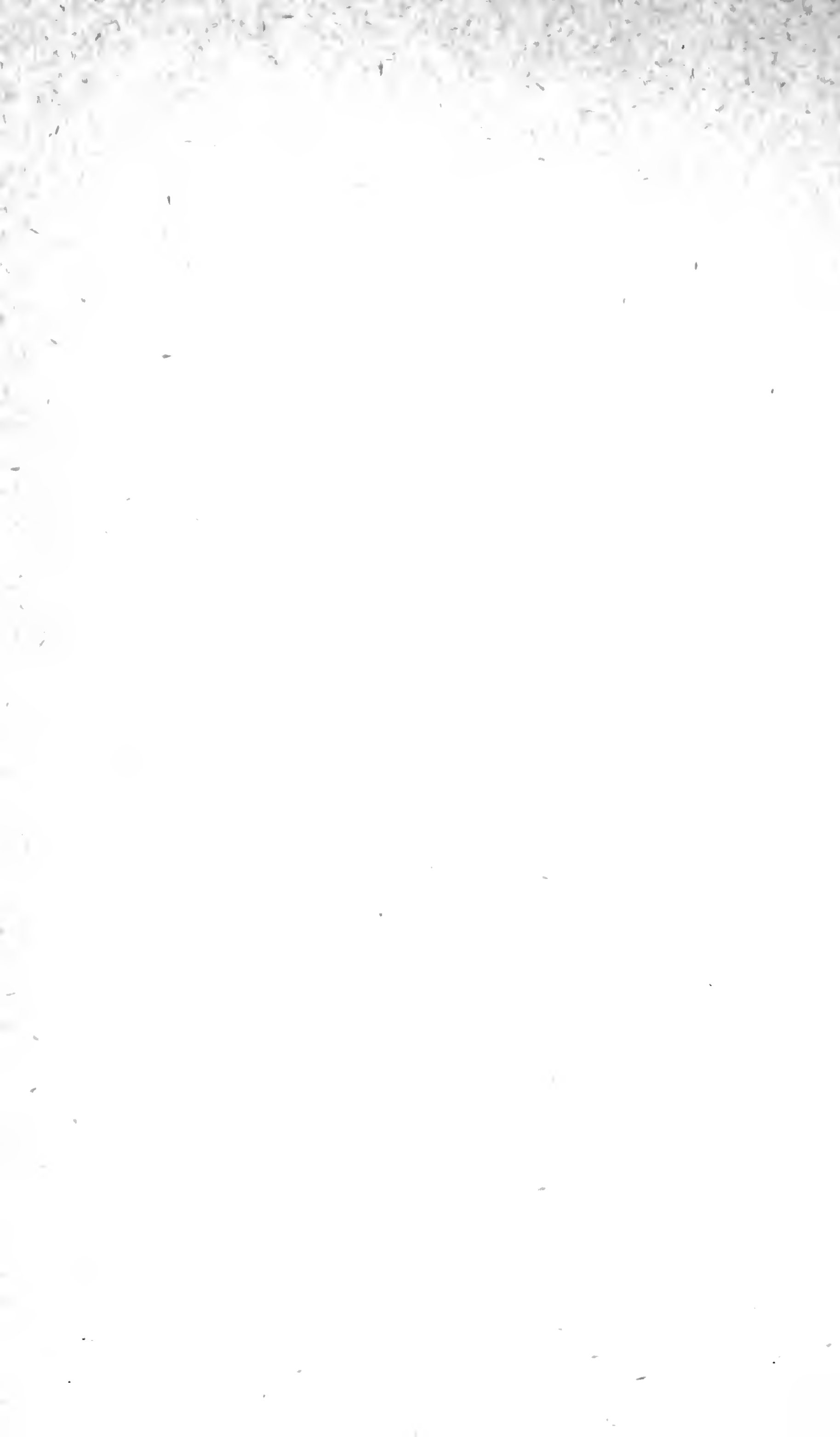

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Nos. 12,716 and 12,813

United States Court of Appeals
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Securities and Exchange Commission,
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Appellees.

Charles T. Jones,
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vs.

Securities and Exchange Commission, Market Street Railway Company, Standard Gas and Electric Company and Standard Power and Light Corporation,
Appellees.

(CONSOLIDATED CASES)

PETITION FOR A REHEARING.

To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

STATEMENT OF GROUNDS FOR PETITION FOR REHEARING.

1. There is no rational basis in fact for drawing the inference that Cogan, in effecting a settlement, was subject to a conflict of interest.

2. For a breach of trust falling short of a conflict of interest, it is an error of law to deny a fiduciary a fee without proof of damage.

3. The findings of the Securities and Exchange Commission approved by the opinion of this Court in effect confiscate a legitimate cause of action of the stockholder, Charles T. Jones, against Standard Power without affording him his day in Court.

ARGUMENT.

(1) This Honorable Court has, as did the Securities and Exchange Commission, seized upon casual remarks of petitioner Cogan passed in the reciprocal banter of a convivial luncheon (T.R. pp. 451-2) and so considered by his auditors (T.R. pp. 487-8) to deny Cogan his fee. On that basis and with the interdicted conversation treated in its proper setting, we state, with all deference to the Court, that the Court's opinion reduces the province of a fiduciary to that of a robot devoid of ordinary natural instincts for casual levity. No case in the books has gone so far.

It is conceded that Cogan was instrumental in uncovering the wrongful overcharges against Market Street by its parent companies (Opinion p. 5) and of developing the case against them (Opening Brief SEC pp. 43-44). After saving Market Street more than $600,000 (Opening Brief of SEC p. 35), his plea for recompense is summarily rejected, but his negotiated settlement, fee deleted, is found by the Securities and Exchange Commission and this Court to meet the standards of "fairness and equity" within the meaning of the Public Utilities Holding Company Act, and the settlement is by the Securities and Exchange Commission vigorously defended and demonstrated with mathematical exactness to be well within the range of the cash advanced to Market Street by its parent companies, plus interest (Opening Brief SEC pp. 38-43).

The Securities and Exchange Commission said, in its opinion denying Cogan his fee (P.R. pp. 61-62), and this Court adopted its statement (Opinion p. 5), that the "Commission declined to speculate upon the precise effect of Cogan's offer to accept a retainer from his adversary." Is it not within the realm of the arbitrary to attempt to demonstrate the fairness of a settlement negotiated by counsel and at the same time and in the same breath charge counsel with the taint of representing conflicting interests? Hasn't speculation in that regard perforce left the case? Does not the same proof which demonstrates the fairness of the settlement demonstrate the good faith, judgment and integrity of the negotiator?

(2) This Court has found in its opinion (p. 6) that "the Commission's inference that there was a conflict of interest was a reasonable one." That conclusion results from treating the interdicted conversation in a serious vein. So treated, there is still no evidence of a conflict of interest. If a retainer in other cases was solicited of Standard Gas, it was refused by it (T.R. pp. 487-8). The inchoate conflict died aborning. He never in fact served two masters.

The leading case on the subject, namely, *Woods v. City Bank and Trust Co.*, 312 U.S. 262, 268, lays down the governing rule as follows:

> "Where an actual conflict of interest exists, no more need be shown in this type of case to support a denial of compensation."

That case was cited and followed in the case of *In re Midland United Co.*, 159 Fed. (2d) 340, where the Court at great length undertook to find and demonstrate the "actual" conflict of interest. At page 346 of the opinion, the Court said:

> "However, independent of Section 249, we hold that appellant is barred from recovery under the principles enunciated in the Woods and Avon Park cases. They hold, as already pointed out, that the bankruptcy court had plenary power to deny compensation to a fiduciary in a reorganization proceeding 'where an actual conflict of interest exists' regardless of whether 'fraud or unfairness' resulted.
>
> "The appellant does not dispute the fact that he was a fiduciary for Utilities' debenture holders

> and that as such he owed them a duty of loyalty. It is necessary, then, only to ascertain from the record as to whether or not there was an actual conflict of interest."

In the absence of a proven "actual" conflict of interest, which under the foregoing rules justifies, without more, a denial of a fiduciary's fee, the burden, on elementary principles, is on the Securities and Exchange Commission or the minority stockholders of Market Street (the clients of Cogan) to prove at least an indiscretion plus damage before Cogan's fee can be denied or even reduced. *Berner v. Equitable Office Building Corp.*, 175 Fed. (2d) 218. In that case, an attorney for the debtor in corporate reorganization tipped off one Bell that the corporation was placing "a new issue which would increase the value of the stock." The Court found, at page 221, the following:

> "* * * what Berner told Bell on the evening of July 8th amounted to giving him an opportunity to buy the shares at an unlawful advantage over the shareholders from whom he bought, and that this was a breach of trust."

The ruling of the Court at page 222 is as follows:

> "Nevertheless, since Congress limited the penalty of entire forfeiture to purchases by a fiduciary, we should not be warranted in extending that penalty to the situation at bar; and we think that the consequences should be only those which attend any breach of trust in equity: i.e., that in determining what the trustee's compensation shall be, the court will, as a matter of discretion dimin-

ish the allowance which it would otherwise make, in proportion to the gravity of the breach * * * As neither the allowance itself, nor any reduction because of the breach, is for us, we shall not indicate what either should be, except merely to suggest, though not to require, that in any event the reduction may well be not less than the loss to the sellers of whom Bell bought the 20,000 shares."

In cases involving breaches of trust, like that in the *Berner* case, supra, the damage, if any, lends itself readily to proof, while in cases involving an actual conflict of interest such as that in the *Woods* case, supra, the proof of damage is elusive, if not impossible. The Court in the *Woods* case was cognizant of this distinction and gave voice to it in the following language at page 268:

> "Furthermore, the incidence of a particular conflict of interest can seldom be measured with any degree of certainty. The bankruptcy court need not speculate as to whether the result of the conflict was to delay action where speed was essential, to close the record of past transactions where publicity and investigation were needed, to compromise claims by inattention where vigilant assertion was necessary, or otherwise to dilute the undivided loyalty owed to those whom the claimant purported to represent. Where an actual conflict of interest exists, no more need be shown in this type of case to support a denial of compensation."

In the instant case, we have at worst an indiscretion on the part of a fiduciary who is and should be en-

titled to at least the consideration given to the attorney in the *Berner* case, supra. We reiterate that the settlement negotiated by him was proven to be both "fair and equitable" and therefore that the indiscretion did not result in a loss to his clients. Cogan therefore should be awarded his fee.

(3) The original plan of dissolution of Market Street called for settlement solely of the open account between Standard Gas and Electric Company and Market Street. This was in accordance with the settlement theretofore effected between Market Street and Standard Gas (T.R. p. 611). It was not until the Securities and Exchange Commission (P.R. pp. 93-94) itself solicited an amended plan of dissolution from Market Street, that any issue of a release of Standard Power ever came before the Commission. At that time Appellant Charles T. Jones, as a stockholder of Market Street, had his suit on file in the Federal Court in New Jersey against Standard Power. The subsequent action of the Commission in finding that the sum of $512,500 was a "fair and equitable" settlement of the open accounts of "Standard Gas and its subsidiaries including Standard Power" in effect confiscated that cause of action. This was done without any hearing before the Securities and Exchange Commission (Opening Brief SEC p. 45) as to the merits of Stockholder Jones' claim against Standard Power. It is most unusual, to say the least, that the attorney for Standard Gas in argument before the Commission stated that the original settlement between Market Street and Standard Gas contemplated

a release of Standard Power, when the settlement itself spoke only of Standard Gas (T.R. p. 611). The mere fact that the entire overcharges were the subject of evidence submitted by William J. Cogan to the Securities and Exchange Commission (Opinion, p. 4) did not justify the Commission in similarly injecting the "release of Standard Power" into the settlement heretofore arrived at with Standard Gas alone without a full hearing on the merits of Market Street's claim against Standard Power. Stockholder Jones has never had his day in Court.

It is respectfully submitted that a rehearing should be granted by this Honorable Court to both Charles T. Jones, and William J. Cogan, petitioners herein.

Dated, San Francisco, California,
January 25, 1952.

William J. Cogan,
M. Mitchell Bourquin,
Attorneys for Petitioners William J. Cogan and Charles T. Jones.

Certificate of Counsel.

We hereby certify that we are of counsel for petitioners in the above entitled cause and that in our judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
January 25, 1952.

William J. Cogan,
M. Mitchell Bourquin,
Counsel for Petitioners.

No. 12760

United States Court of Appeals

for the Ninth Circuit.

CALIFORNIA STATE BOARD OF EQUALIZATION,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estates of Twenty-Nine Palms Air Academy, et al.,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

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PAUL P. O'BRIEN
CLERK

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 12760

United States Court of Appeals
for the Ninth Circuit.

CALIFORNIA STATE BOARD OF EQUALIZATION,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estates of Twenty-Nine Palms Air Academy, et al.,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES

FRED N. HOWSER, ESQ.,

Attorney General of the State of California, By

EDWARD SUMNER, ESQ.,

Deputy Attorney General, for the State Board of Equalization.

CRAIG, WELLER & LAUGHARN, By

HUBERT F. LAUGHARN, ESQ.,

For Trustee, Paul W. Sampsell.

In the United States District Court, Southern District of California, Central Division

Nos. 48662-WM; 45174-WM; 47639-C; 46684-C; 47766-W; 48433-Y; 44642-C; 44952-BH; 45904-C; 46204-C; 47291-W; 45720-PH; 47148-Y; 46610-C; 46239-C; 45022-W; 46523-C; 45868-WM; 43980-C; 48703-C; 47165-BH; 47369-PH; 45570-W; 25114-C; 46487-BH; 43803-C

In the Matters of

TWENTY NINE PALMS AIR ACADEMY, et al.,

Bankrupts.

MOTION TO SET ASIDE, VACATE AND DISMISS VOID ORDERS PURPORTING TO AFFECT THE CALIFORNIA STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA

Whereas, it appears that identical mimeographed documents each entitled "Petition for Order to Show Cause and for Bar Order, and for Hearing on Trustee's Objections to Claim" were filed in each of the above matters by the trustee therein (a copy of said document being attached hereto as Exhibit "A") with the Referee to whom in each instance each of the above-entitled matters had been referred, and

Whereas, it further appears that the Referee in each instance issued identical mimeographed documents entitled "Order and Order to Show Cause Re Claim for Sales Tax" (a copy thereof being attached as Exhibit "B"), and

Whereas, said Orders are void and purport to deal with matters beyond the jurisdiction of said Referees, and indeed all Federal courts, and

Whereas, the California State Board of Equalization duly moved to vacate and dismiss all said void Orders before the appropriate Referee in each instance, and

Whereas, said motions were in each instance denied, and additional identical mimeographed Orders signed and filed in each instance, said Orders being entitled "Order: (1) Dismissing Order to Show Cause Issued Upon Motion of California State Board of Equalization (2) Extending Time for Filing of Administration Tax Obligation" (a copy thereof attached hereto as Exhibit "C").

Now, Therefore, the California State Board of Equalization moves the Court to set aside, vacate and dismiss all the aforesaid Orders on the following grounds:

1. The California State Board of Equalization is not a party to any of the above-entitled proceedings.

2. The Orders sought to be set aside, vacated and dismissed amount to an attempt to subject the State of California to the jurisdiction of this Court without its consent, and, indeed, even without compliance with Rules 3 and 4 of the Federal Rules of Civil Procedure.

3. Neither the petitions upon which the above Orders were issued nor the Orders themselves contain any allegation to support the contention that

this Court has jurisdiction either of the State of California or the matters which are the subject of said Orders.

4. It is an elementary and long established principle of constitutional law that a state may not be sued without its consent.

5. The foregoing well established constitutional principle is recognized in Section 1341 of Revised Title 28 of the United States Code which provides that this Court may not enjoin the collection of taxes under a valid taxing statute where an adequate remedy exists under state law.

6. It has been judicially established that an adequate remedy to contest an erroneous, invalid or illegal assessment under the California Sales and Use Tax Law is provided by that Law.

7. The Constitution of the State of California specifically provides that suit may be brought against the State of California only in such manner and in such courts as is provided by the State Legislature.

8. The California State Legislature has specifically provided a judicial remedy against the imposition of erroneous or illegal assessments under the California Sales and Use Tax Law and has specifically denied its consent to procedure by way of injunction or writ of mandate or other legal or equitable process issued against the State or any officer of the State to prevent or enjoin the col-

lection of any tax required to be collected under the California Sales and Use Tax Law.

9. It is also pertinent to note that the Orders sought to be set aside, vacated and dismissed deal with matters which are not bankruptcy matters, and seek to compel the State of California to follow a procedure for which there is no statutory or judicial authority.

10. The so-called "Orders" are in fact void and should be stricken from the record in each of the above-entitled matters.

11. Although irrelevant to the jurisdictional points involved, it is to be noted that the "Orders" denying the State's motion to dismiss were not signed in compliance with Local Rule 7(a) in that copies of the proposed "Orders" were mailed to counsel on the 10th day of September, 1950, and signed on the 11th and 12th days of September, 1950.

Dated September 19, 1950.

Respectfully submitted.

FRED N. HOWSER,
Attorney General.

/s/ EDWARD SUMNER,
Deputy Attorney General, Attorneys for State Board of Equalization.

EXHIBIT A

In the District Court of the United States for the Southern District of California, Central Division

In Bankruptcy No.........

In the Matter of

Bankrupt.

PETITION FOR ORDER TO SHOW CAUSE AND FOR BAR ORDER, AND FOR HEARING ON TRUSTEE'S OBJECTIONS TO CLAIM

To the Honorable Referee in Bankruptcy:

The verified petition of the undersigned, respectfully shows:

I.

That he is the duly appointed, qualified and acting Trustee in the above-entitled bankruptcy proceedings.

II.

That he has completed the administration of the within estate and is preparing to close the same.

III.

That in the course of administration herein, your trustee and/or receiver sold, pursuant to Order Confirming Sale certain personal property; that the said sale was made in the within administration pursuant to the order of the Referee. That your trustee and/or receiver did not operate the business of the bankrupt and that the said sale or sales

so made were not made in the operation of any business, but were made as a liquidation sale in the within proceedings.

IV.

Your trustee alleges that in connection with the said sale your trustee and/or receiver is therefore not obligated to pay California State Sales Tax of three and one-half per cent (or in any other amount) of the sales price. Your trustee alleges that the State Board of Equalization has heretofore made certain claims in certain bankruptcy estates against the trustee and/or receiver thereof to the effect that they should pay to the State Board of Equalization a sales tax upon bankruptcy liquidation administration sales and further that the trustee and/or receiver is personally liable therefore.

V.

Your trustee alleges that in accordance with his investigation no levy, notice or assessment or other proceedings have been made for the collection and payment of any such tax by your trustee, either as trustee or individually by the said State Board of Equalization. However, your trustee alleges that if there is any such tax legally owing it should be paid from the cash funds in the hands of the trustee before the same are ordered disbursed, and your trustee alleges that the said State Board of Equalization, if it maintains that there is any sales tax owing to it by virtue of the liquidation administration sale made herein by your trustee and/or receiver should be ordered to present and file the

same herein with the Referee, and mail a copy thereof to your trustee, and your trustee alleges that should any claim not be so filed within the time fixed by the Referee that a Bar Order be made herein perpetually restraining and enjoining the State Board of Equalization from hereafter asserting either against the said bankrupt estate, your petitioner herein as trustee and/or receiver, or your petitioner as an individual, any claim for sales tax because of sale of personal property made by your trustee and/or receiver in the administration herein.

Wherefore, your trustee prays:

1. That in the event the said State Board of Equalization has or maintains a claim for sales tax because of any sale of personal property made by the trustee and/or receiver in the administration herein pursuant to Order Confirming Sale of the Referee in the within estate, that it present and file herein its verified claim for the payment of the said tax as an expense of administration herein. Said claim to be filed within twenty days from date of the mailing of a certified copy of the within Order to the said respondent:

2. Your trustee further prays that the Court make an Order herein in the event a claim is not so filed, barring the said respondent from at any time in the future, maintaining or asserting against your petitioner herein, either as trustee and/or receiver or individually, or in the administration of the within bankruptcy estate, any claim for alleged sales tax resulting from or computed upon

sale of personal property made in the adminstration herein;

3. Your trustee further prays that in the event any such claim for sales tax is so filed within the time fixed by the Order of the Referee, that the said claim and the trustee's within objections thereto be heard before the Referee on a day fixed by the Referee.

Dated..................

....

CRAIG, WELLER & LAUGHARN,

By HUBERT F. LAUGHARN,

Attorneys for Trustee.

EXHIBIT B

In the District Court of the United States for the Southern District of California, Central Division

In Bankruptcy No.........

In the Matter of

Bankrupt.

ORDER AND ORDER TO SHOW CAUSE RE CLAIM FOR SALES TAX

The trustee herein having filed his verified Petition for Order to Show Cause and for Bar Order in connection with any claim for sales tax asserted by the State Board of Equalization because of sale of personal property made by the trustee in the

administration of the within estate (other than sales arising in an operation of the business) and it appearing that the trustee herein is desirous of closing the within proceedings and securing his discharge as trustee, and it further appearing that a claim or charge for sales tax has been or may be asserted by the State Board of Equalization in the within proceedings or against the trustee herein, either as trustee or individually,

Now, Therefore, the Referee makes the following Order:

It Is Ordered that in the event the State Board of Equalization has or maintains a claim or charge for sales tax because of any sale made by the trustee or receiver in the administration herein pursuant to Order Confirming Sale of the Referee herein, that it present and file herein its verified claim is not so filed, that said respondent be, and it of administration within twenty days from the date of the mailing of a certified copy of the within Order and a copy of the within Petition to the State Board of Equalization at 1020 N Street, Sacramento, California, and to Black Building, Los Angeles 13, California, and the within Order and Petition shall be so mailed to the respondent within five days of the date of the within Order.

It Is Further Ordered that in the event such a claim is not so filed, that said respondent be, and it hereby is, barred from at any time in the future maintaining or asserting against the within trustee, in his trustee capacity or individually or in the ad-

ministration of the within bankrupt estate, any claim for alleged sales tax resulting from or computed upon sale of personal property made in the within estate.

It Is Further Ordered that in the event any such claim for sales tax is so filed within the time fixed by the within Order, the said claim and the trustee's within objections thereto be heard before the Referee.

Dated............, 1950.

........................,
Referee in Bankruptcy.

In the District Court of the United States for the Southern District of California, Central Division

In Bankruptcy No.........

In the Matter of

Bankrupt.

ORDER

(1) Dismissing Order to Show Cause Issued Upon Motion of California State Board of Equalization

(2) Extending Time for Filing of Administration Tax Obligation

An Order having heretofore been issued herein upon the verified Petition of the trustee herein

requiring the California State Board of Equalization, in the event it has or maintains a claim or charge for sales tax because of any sale of personal property made by the trustee or receiver in the administration of the within estate, to present and file herein its verified claim for the payment of said tax as an expense of administration within twenty days from the date of the mailing to it of a certified copy of said Order and a copy of the trustees Petition; which Order further provided that in the event such a claim is not so filed, the respondent be barred from maintaining or asserting against the trustee, in his trustee or individual capacity, or in the administration herein, any claim for the said alleged sales tax resulting from or computed upon sales of personal property by the trustee and thereafter a Motion was filed herein by the California State Board of Equalization to vacate and dismiss the said Order and based thereon, an Order to Show Cause was issued by the Referee requiring the trustee to show cause why the said Order issued upon the trustee's Petition should not be vacated, and the California State Board of Equalization appearing by Edmund Sumner, Deputy Attorney General, and the trustee appearing by Craig, Weller & Laugharn by Hubert F. Laugharn, his attorneys, and the Referee being fully advised in the premises,

Now, Therefore, makes the following Order:

It Is Ordered that the Order to Show Cause issued upon the Motion of the California State

Board of Equalization be and the same hereby is dismissed.

It Is Further Ordered that the time within which the said California State Board of Equalization was heretofore given in the prior Order of the Referee to file any claim or charge it may have for sales tax because of any sale of personal property made by the trustee or receiver in the administration of the within estate is extended to twenty days from the date hereof.

It Is Further Ordered that the trustee mail, postage prepaid, a copy of the within Order within two days from the date hereof to the California State Board of Equalization at 1020 N Street, Sacramento, California, and at Black Building, Los Angeles 13, California.

Dated............, 1950.

........................,
Referee in Bankruptcy.

[Endorsed]: Filed September 19, 1950.

[Title of District Court and Causes.]

NOTICE OF MOTION

To Craig, Weller and Laugharn, attorneys for the trustees in bankruptcy of all the above-entitled matters:

Please Take Notice that pursuant to the Order of Consolidation dated September 18, 1950 (a copy

of which is attached hereto), and the Order Shortening Time dated September 19, 1950 (a copy of which is attached hereto), the undersigned will bring the Motion (also attached hereto) on for hearing before the Honorable James M. Carter, District Court Judge, on the 25th day of September, 1950, at the hour of 10:00 o'clock a.m., or as soon thereafter as counsel can be heard.

FRED N. HOWSER,
Attorney General,

/s/ EDWARD SUMNER,
Deputy Attorney General, Attorneys for State Board of Equalization.

[Endorsed]: Filed September 19, 1950.

[Title of District Court and Causes.]

Nos. 48662-WM, 45174-WM, 47639-C, 46684-C, 47766-W, 48433-Y, 44642-C, 44952-BH, 45904-C, 46204-C, 47291-W, 45720-PH, 47148-Y, 46610-C, 46239-C, 45022-W, 46523-C, 45868-WM, 43980-C, 48703-C, 47165-BH, 47369-PH, 45570-W, 45114-C, 46487-BH, 43803-C

ORDER OF CONSOLIDATION

Whereas, it appears that identical Orders have been signed by Referees in Bankruptcy, the Honorable Hugh L. Dickson, the Honorable David B. Head and the Honorable Benno M. Brink, in the twenty-six (26) above-entitled matters, each of said

Orders relating to the California State Board of Equalization, and

Whereas, it appears that the California State Board of Equalization has moved to dismiss said Orders in each instance before the appropriate Referee, and

Whereas, said motions were denied and identical Orders upon said motions having been signed and filed by said Referees on the 11th and 12th days of September, 1950, and

Whereas, the California State Board of Equalization is now desirous of moving to vacate and set aside all the aforesaid Orders on jurisdictional grounds, said grounds being identical in each case, and

Whereas, the above matters have heretofore been assigned to various Judges of this Court, namely, the Honorable William C. Mathes, the Honorable Benjamin Harrison, the Honorable James M. Carter, the Honorable Peirson M. Hall, the Honorable Leon R. Yankwich and the Honorable Harry C. Westover,

It Is Hereby Ordered that the above-entitled matters, insofar as they pertain to the aforesaid Orders and motions, are hereby assigned to the Honorable James M. Carter for further hearing and/or proceedings as may be initiated by any of the interested parties.

Dated this 18th day of September, 1950.

PAUL J. McCORMICK,
Chief District Judge.

We hereby consent to the foregoing Order of Reassignment.

/s/ WILLIAM C. MATHES,
Judge of the District Court.

.........................,
Benjamin Harrison,
Judge of the District Court.

/s/ JAMES M. CARTER,
Judge of the District Court.

.........................,
Peirson M. Hall,
Judge of the District Court.

/s/ LEON R. YANKWICH,
Judge of the District Court.

/s/ HARRY C. WESTOVER,
Judge of the District Court.

[Endorsed]: Filed September 18, 1950.

[Title of District Court and Causes.]

ORDER SHORTENING TIME

Good cause appearing therefor, It Is Ordered:

That the time for service of notice that the Motion (a copy of which is attached hereto) will be brought on for hearing on the 25th day of September, 1950, at 10:00 o'clock a.m., or as soon thereafter as counsel may be heard, be and the same is hereby shortened, and that said Notice of Motion

be either served by mail by deposit in the United States mail no later than September 19, 1950, or by delivery to the offices of Craig, Weller and Laugharn, attorneys for the trustees in all of the above matters, no later than September 20, 1950.

Dated September 19, 1950.

/s/ JAMES M. CARTER,
District Court Judge.

[Endorsed]: Filed September 19, 1950.

[Title of District Court and Causes.]

Nos. 45432-HW, 46737-WM, 47155-HW, 47625-PH

ORDER OF CONSOLIDATION

Whereas it appears that identical Orders have been signed by the Honorable Reuben G. Hunt, Referee in Bankruptcy, in each of the above-entitled matters, each of said Orders relating to the California State Board of Equalization, and

Whereas, it appears that the California State Board of Equalization has moved to dismiss said Orders in each instance before Referee Hunt, and

Whereas, said motions were denied and identical Orders upon said motion having been signed and filed by Referee Hunt on the 15th day of September, 1950, and

Whereas, the California State Board of Equalization is now desirous of moving to vacate and set

aside all the aforesaid Orders on jurisdictional grounds, said grounds being identical in each case, and

Whereas, the above-entitled matters have heretofore been assigned to various Judges of this Court, namely, the Honorable Peirson Hall, the Honorable William C. Mathes, and the Honorable Harry C. Westover, and

Whereas, it further appears that an Order consolidating twenty-six (26) additional identical matters has heretofore been made and said twenty-six (26) matters assigned to the Honorable James M. Carter for further hearing and/or proceedings as may be initiated by any of the interested parties,

It Is Hereby Ordered that the above-entitled matters, insofar as they pertain to the aforesaid Orders and motions, are hereby likewise assigned to the Honorable James M. Carter for further hearing and/or proceedings as may be initiated by any of the interested parties.

Dated September 20, 1950.

PAUL J. McCORMICK,
Chief District Judge.

[Endorsed]: Filed September 20, 1950.

[Title of District Court and Causes.]

Nos. 45432-HW, 46737-WM, 47155-HW, 47625-PH

MOTION TO SET ASIDE, VACATE AND DISMISS VOID ORDERS PURPORTING TO AFFECT THE CALIFORNIA STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA

Whereas, it appears that identical mimeographed documents, each entitled "Petition for Order to Show Cause and for Bar Order, and for Hearing on Trustee's Objections to Claim," were filed in each of the above matters by the trustee herein (a copy of said document being attached hereto as Exhibit "A") with the Referee to whom in each instance each of the above-entitled matters had been referred, and

Whereas, it further appears that the Referee in each instance issued identical mimeographed documents entitled "Order and Order to Show Cause Re Claim for Sales Tax" (a copy thereof being attached as Exhibit "B"), and

Whereas, said Orders are void and purport to deal with matters beyond the jurisdiction of said Referees, and indeed all Federal courts, and

Whereas, the California State Board of Equalization duly moved to vacate and dismiss all said void Orders before the appropriate Referee in each instance, and

Whereas, said motions were in each instance denied, and additional identical mimeographed Orders

signed and filed in each instance, said Orders being entitled "Order: (1) Dismissing Order to Show Cause Issued Upon Motion of California State Board of Equalization (2) Extending Time for Filing of Administration Tax Obligation" (a copy thereof being attached hereto as Exhibit "C").

Now, Therefore, the California State Board of Equalization moves the Court to set aside, vacate and dismiss all the aforesaid Orders on the following grounds:

1. The California State Board of Equalization is not a party to any of the above-entitled proceedings.

2. The Orders sought to be set aside, vacated and dismissed amount to an attempt to subject the State of California to the jurisdiction of this Court without its consent, and, indeed, even without compliance with Rules 3 and 4 of the Federal Rules of Civil Procedure.

3. Neither the petitions upon which the above Orders were issued nor the Orders themselves contain any allegation to support the contention that this Court has jurisdiction either of the State of California or the matters which are the subject of said Orders.

4. It is an elementary and long established principle of constitutional law that a state may not be sued without its consent.

5. The foregoing well established constitutional principle is recognized in Section 1341 of Revised

Title 28 of the United States Code which provides that this Court may not enjoin the collection of taxes under a valid taxing statute where an adequate remedy exists under state law.

6. It has been judicially established that an adequate remedy to contest an erroneous, invalid or illegal assessment under the California Sales and Use Tax Law is provided by that Law.

7. The Constitution of the State of California specifically provides that suit may be brought against the State of California only in such manner and in such courts as is provided by the State Legislature.

8. The California State Legislature has specifically provided a judicial remedy against the imposition of erroneous or illegal assessments under the California Sales and Use Tax Law and has specifically denied its consent to procedure by way of injunction or writ of mandate or other legal or equitable process issued against the State or any officer of the State to prevent or enjoin the collection of any tax required to be collected under the California Sales and Use Tax Law.

9. It is also pertinent to note that the Orders sought to be set aside, vacated and dismissed deal with matters which are not bankruptcy matters, and seek to compel the State of California to follow a procedure for which there is no statutory or judicial authority.

10. The so-called "Orders" are in fact void and

should be stricken from the record in each of the above-entitled matters.

Dated September 20th, 1950.

Respectfully submitted,

FRED N. HOWSER,
Attorney General.

/s/ EDWARD SUMNER,

Deputy Attorney General, Attorneys for the State Board of Equalization.

[Endorsed]: Filed September 20, 1950.

In the District Court of the United States for the Southern District of California, Central Division

In the Matters of:

In Bankruptcy No. 43,803-PH
TWENTY-NINE PALMS AIR ACADEMY

In Bankruptcy No. 43,980-C
SHANAHAN BROS., INC.

In Bankruptcy No. 44,642-C
JACK DEAN

In Bankruptcy No. 44,952-BH
NORTH AMERICAN SKYLINE

In Bankruptcy No. 45,022-HW
IRENE V. BURKE

In Bankruptcy No. 45,114-C
HAMILL JONES CORPORATION

In Bankruptcy No. 45,174-WM
RADIAPHONE CORPORATION

In Bankruptcy No. 45,432-HW
GEORGE B. McCABE

In Bankruptcy No. 45,570-HW
ED SALVATIERRA

In Bankruptcy No. 45,720-PH
CURTIS and MIRIAM STRAUB, etc.

In Bankruptcy No. 45,868-WM
JUVENILE PRODUCTS OF PASADENA

In Bankruptcy No. 45,904-C
GREAT WESTERN BISCUIT CO.

In Bankruptcy No. 46,204-C
DAVID SHAPIRO

In Bankruptcy No. 46,239-C
MICAL, INC.

In Bankruptcy No. 46,487-PH
PHIL DOMECUS

In Bankruptcy No. 46,523-C
E. W. E. MILL & LUMBER CO.

In Bankruptcy No. 46,610-C
EAGLE AIR FREIGHT

In Bankruptcy No. 46,684-C
SARAH PAYTON

In Bankruptcy No. 46,737-WM
NORMAN D. KESSLER, etc.

In Bankruptcy No. 47,148-Y
RAYMOND CHARLES WOERNEL

In Bankruptcy No. 47,155-HW
CITY TRANSFER & STORAGE CO.

In Bankruptcy No. 47,165-BH
FASHION BOOTERY, etc.

In Bankruptcy No. 47,291-HW
PERRY B. STAVER

In Bankruptcy No. 47,369-PH
ARCADIA FURNITURE & MFG. CO.

In Bankruptcy No. 47,625-PH
KATHRYN THEROFF

In Bankruptcy No. 47,639-C
MODEL PACKING CO. OF CALIF.

In Bankruptcy No. 47,766-HW
THOMAS COLOR, INCORPORATED

In Bankruptcy No. 48,433-Y
VERMONT MARKET, etc.

In Bankruptcy No. 48,662-WM
IRVING A. PESKIN

In Bankruptcy No. 48,703-C
JOSEPH F. SHOVLIN

Bankrupts.

ORDER

A Motion having been made by the California State Board of Equalization to set aside, vacate and

dismiss certain Orders made by the Referees in Bankruptcy of this Court in the above-entitled bankruptcy estates and the said Motion coming on for hearing on September 25, 1950, at 10 a.m., and Fred N. Houser, Attorney General, by Edward Sumner, Deputy Attorney General, appearing upon behalf of the California State Board of Equalization, and Craig, Weller & Laugharn by Hubert F. Laugharn appearing upon behalf of Paul W. Sampsell, trustee of said respective bankrupt estates; and it appearing that heretofore proceedings were had in the said respective bankrupt estates before said respective Referees upon Petitions for Orders to Show Cause and for Bar Orders, which Petitions were filed by the trustee in the respective bankruptcy estates, and that "Orders and Orders to Show Cause re Claim for Sales Tax" were made by the respective Referees in the said respective bankrupt estates which provided in substance as follows:

> "It Is Ordered that in the event the State Board of Equalization has or maintains a claim or charge for sales tax because of any sale made by the trustee or receiver in the administration herein pursuant to Order Confirming Sale of the Referee herein, that it present and file herein its verified claim for the payment of said tax as an expense of administration within twenty days from the date of the mailing of a certified copy of the within Order and a copy of the within Petition to the State Board of Equalization at 1020 N Street, Sacra-

mento, California, and to Black Building, Los Angeles 13, California, and the within Order and Petition shall be so mailed to the respondent within five days of the date of the within Order.

"It Is Further Ordered that in the event such a claim is not so filed, that said respondent be, and it hereby is, barred from at any time in the future maintaining or asserting against the within trustee, in his trustee capacity or individually or in the administration of the within bankrupt estate, any claim for alleged sales tax resulting from or computed upon sale of personal property made in the within estate";

that thereafter Motions were made by the California State Board of Equalization before the Referees to vacate and dismiss the said Orders and that upon the hearing thereon before the said respective Referees in said respective cases, the Referees made Orders thereon which provided in part:

"It Is Ordered that the Order to Show Cause issued upon the Motion of the California State Board of Equalization be and the same hereby is dismissed.

"It Is Further Ordered that the time within which the said California State Board of Equalization was heretofore given in the prior Order of the Referee to file any claim or charge it may have for sales tax because of any sale of personal property made by the trustee or receiver in the administration of the within

estate is extended to twenty days from the date hereof."

that thereafter no Petitions for Review were filed within the time fixed as provided in Section 39(c) of the Bankruptcy Act by the said California State Board of Equalization and that the said Orders of the Referees have become final and it appearing that by means of the present pending Motion the said California State Board contends that the said Orders of the Referees should be set aside, vacated and dismissed.

And, the matter having been orally presented to the Judge and briefs having been filed by respective counsel and the Court being fully advised in the premises,

Now, Therefore,

It Is Ordered that the Motion of the California State Board of Equalization be set aside, vacate and dismiss the said Orders of the Referees, be and the same hereby is denied.

It Is Further Ordered that the time fixed by the Referees in the said respective Orders within which the said California State Board of Equalization, in the event it had or maintains a claim or charge for the sales tax because of any sale made by the trustee or receiver in the administration of the respective bankrupt estates, could present and file before the Referees its claims for payment of said sales tax as expenses of administration, be and the same hereby is extended, in each of the said bankrupt estates, for a period of twenty days from the date of this Order.

It Is Further Ordered that counsel for the said trustee shall cause to be mailed a true copy of the within Order to the said California State Board of Equalization and its counsel appearing herein, within three days from the date hereof.

Dated November 1, 1950.

JAMES M. CARTER,
United States District Judge.

[Endorsed]: Filed November 1, 1950.

Judgment entered Nov. 2, 1950.

[Title of District Court and Causes.]

NOTICE OF APPEAL

Notice Is Hereby Given that the California State Board of Equalization hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order of the Honorable James M. Carter entered on the 2nd day of November, 1950, denying the Board's Motion to Set Aside, Vacate and Dismiss certain Orders made by the Referees in Bankruptcy of this Court in the above-entitled bankruptcy estates.

This Notice of Appeal is filed for the express purpose of preserving to the State of California and its duly authorized taxing agency, the California State Board of Equalization, such rights and remedies it may have with respect to the aforesaid

Orders of the Referees in Bankruptcy and the Honorable James M. Carter which it may be compelled to resort to if remedies deemed more appropriate in the premises are for some reason not available.

Dated November 30, 1950.

FRED N. HOWSER,
Attorney General.

/s/ EDWARD SUMNER,
Deputy Attorney General, Attorneys for California State Board of Equalization.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 30, 1950, U.S.D.C.

[Endorsed]: Filed December 13, 1950, U.S.C.A.

[Title of District Court and Causes.]

APPELLANT'S DESIGNATION OF RECORD ON APPEAL

To the Clerk of the Above-Entitled Court:

Appellant in the above-entitled matters, California State Board of Equalization, through counsel, hereby designates the entire record before the District Court as heretofore transmitted to the United States Court of Appeals for the Ninth Circuit in support of the Petition for Writ of Prohibition or Other Appropriate Writ in People of the State of California v. United States District Court for the

Southern District of California, Central Division, and the Honorable James M. Carter, Judge of the United States District Court for the Southern District of California, Central Division, Respondents, No. 12740, as the record in the instant appeal.

Pursuant to the provisions of Rule 75(o) of the Rules of Civil Procedure for the United States District Court and pursuant to Rule 11 of the Rules of the United States Court of Appeals for the Ninth Circuit, as amended, request is hereby made that the Clerk of the above-entitled Court transmit the Notice of Appeal, dated November 30, 1950, and this designation. The $25.00 docket fee required by the United States Court of Appeals has already been paid to the Clerk of that Court concurrently with the filing and docketing of a Petition for Leave to Appeal in the within matters. The Petition for Leave to Appeal was given United States Court of Appeals, No. 12760.

Dated at Los Angeles, California, this 8th day of December, 1950.

FRED N. HOWSER,
Attorney General.

JAMES E. SABINE,
Deputy Attorney General.

/s/ EDWARD SUMNER,
Deputy Attorney General, Attorneys for California State Board of Equalization.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 8, 1950.

In the United States District Court, Southern District of California, Central Division

Nos. 43803-PH; 43980-C; 44642-C; 44952-BH; 45022-HW; 45114-C; 45174-WM; 45432-HW; 45570-HW; 45720-PH; 45868-WM; 45904-C; 46204-C; 46239-C; 46487-PH; 46523-C; 46-610-C; 46684-C; 46737-WM; 47148-Y; 47155-HW; 47165-BH; 47291-HW; 47369-PH; 47-625-PH; 47639-C; 47766-HW; 48433-Y; 48-662-WM; and 48703-C.

In the Matters of,

TWENTY-NINE PALMS AIR ACADEMY, et al.,

Bankrupts.

Honorable James M. Carter, Judge Presiding.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Appearances:

For the State Board of Equalization:

FRED N. HOWSER, ESQ.,
Attorney General of the State of California, by

EDWARD SUMNER, ESQ.,
Deputy Attorney General.

For Trustee Paul W. Sampsell:

CRAIG, WELLER & LAUGHARN, by

HUBERT F. LAUGHARN, ESQ.

Monday, September 25, 1950—10:00 A.M.

(Other court matters.)

The Clerk: No. 43803-PH Bankruptcy, Twenty-Nine Palms Air Academy, and other allied bankruptcy matters.

Mr. Sumner: We are ready in that matter, your Honor.

Mr. Laugharn: Ready for Paul W. Sampsell, Trustee, in the various consolidated matters.

The Court: Is Mr. Sampsell going to file a memorandum of any kind?

Mr. Laugharn: Because of the shortness of time I was explaining to counsel I was not able to get it filed heretofore. I have it to present to the court at this time. I have given counsel one copy. It is a reiteration of an argument that I have made ten times on the second floor in this matter, or eight times, and the four referees on two occasions, and as I told counsel when I gave it to him I don't believe I have any new thoughts in this.

Mr. Sumner: One thing I was going to say, your Honor, is that there are included in the list of cases on the calendar today four matters which were not noticed for hearing, along with twenty-six which were. The clerk very kindly included those four in their numerical order on the calendar, and I believe Mr. Laugharn will stipulate that those four cases, the motions in those four cases may be heard [3*] simultaneously with the motions in the twenty-six without any notice.

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* **Page numbering appearing at top of page of original Reporter's Transcript of Record.**

Mr. Laugharn: It is so stipulated.

I would just like to know, as a matter of information, is Mr. Sampsell the trustee in the four cases also?

Mr. Sumner: That is the McCabe, Kessler, City Transfer and Storage, and Theroff cases.

The Court: What are the four cases?

Mr. Sumner: George McCabe, 45432; Norman D. Kessler, 46737; City Transfer & Storage, 47155; and Kathryn Theroff, 47625.

The Court: Hereafter if you are going to file any matters in this proceeding, file it under the low-numbered case. Is that the Twenty-Nine Palms case?

Mr. Sumner: That is right, your Honor.

The Court: All right. Tell me a little something about the background of this. I read your memorandum over and read what papers I had in the file, but I was not able to form very much of an opinion about it from what I read.

Mr. Sumner: Well, the background, your Honor, is very simple, and in view of the simplicity it makes me feel that the orders that were signed by the referee border on the fantastic in their disregard for some very elementary constitutional principles. Basically what has happened is this: For some years there has been a controversy between the taxing [4] agency, namely, the Board of Equalization, and the trustees in bankruptcy, regarding the taxability of sales made by trustees in bankruptcy liquidating bankrupt estates.

The Court: Are these sales while the business

was being conducted, or were these sales in liquidation?

Mr. Sumner: Liquidation sales, sales in liquidation; and the controversy has gone back and forth, and some cases have gone up on it. The latest decision in that was Judge Weinberger's decision of not too long ago, in which he held that liquidation sales by a trustee in bankruptcy were not subject to the California sales tax. Within ten days after that his memorandum opinion came down. Mr. Laugharn, as attorney for the trustee in bankruptcy in all these matters, forthwith went to all the referees upstairs, four of them, and prevailed upon them to sign an order upon a petition which in its very face isn't the basis for any order at all.

I would like to direct your attention preliminarily to that petition, which was attached to our motion as Exhibit A.

It is interesting to note that the only allegations of fact are that the trustee, in each instance, was duly appointed and qualified; that he had completed the administration of the estate, and that he had sold some personal property in the course of liquidating that estate. And that is all he says. Then he goes on to say in Paragraph IV, as a pure conclusion of law, that the trustee isn't obligated for [5] any tax. He says three-and-a-half per cent. The per cent, of course, was either two-and-a-half or three. Then he says that the State Board of Equalization has heretofore made certain claims in certain bankruptcy estates.

Well, the court could take judicial notice of the

fact that claims have been made over the years in bankruptcy estates.

Then he goes on to say, at the end of Paragraph IV, not only that the Board has made certain claims against the trustees and/or receiver, but goes on to say, "and further that the trustee and/or receiver is personally liable therefor."

I think this court can take judicial notice that the Board of Equalization never filed any claim of that type in any case of that type since 1933, when the tax was first adopted.

The Court: By IV he alleges that the State Board is claiming that the trustee or receiver is personally liable.

Mr. Sumner: No. He says, "Has heretofore made certain claims in certain estates." He doesn't say he did it in this one.

The Court: "* * * to the effect that they should pay * * *"

Mr. Sumner: That's right.

The Court: Then the last portion after the last "and" is ambiguous. [6]

Does that allegation mean that the trustee alleges that the State Board has heretofore made certain claims, and further, that one of the claims was that the trustee or receiver is personally liable therefor, or is it a conclusion of law by the trustee to the effect that he is personally liable?

Mr. Sumner: No. I think what Mr. Laugharn was trying to say there—of course he is here and can point out to us if he means something else—but I think he is trying to allege here that the

Board of Equalization not only made claims against the trustees and receivers, but that the Board made the further claim that the trustee or receiver was personally liable. I think that is what he intended.

And if so, I say the court can take judicial notice that never since 1933, did the Board of Equalization make such a claim.

Of course, if he is alleging that the trustee is personally liable, of course, we might agree with him there.

I might point out that he points out in Paragraph V, and again I say in view of the well-settled principle that injunctions issue only upon the showing of irreparable injury where something is done, what he goes on to say is startling: "Your trustee alleges that in accordance with his investigation no levy, notice of assessment or other proceedings have been made for the collection and payment of [7] any such tax by your trustee." Then he goes on to say, "However, * * * if there is any such tax legally owing it should be paid * * *."

Whether it should or not in the manner set forth following the "should" is a question of law. It is not up to Mr. Laugharn to tell anybody how it should be paid.

And, as I say, there is nothing factual in this at all. It is just counsel's version of what the law is on the subject.

And I notice that after saying what should be done he includes in what should be done that an order should be made restricting the Board of Equalization from presenting any claim not only

against the bankrupt estate or the trustee in his fiduciary capacity, but he goes on to say "or your petitioner as an individual." And here is the most fantastic part of it, "any claim for sales tax because of sale of personal property made by your trustee and/or receiver in the administration herein."

Actually if an order like that could be made, it would mean if the trustee sold some property here, even though he might not be liable on the sale, any individual who isn't even connected with this court couldn't be subjected to the tax, even if the law so provides.

Then the prayer, of course, I won't go into, because identical petitions were presented to the four referees after discussion with them, and the orders that were issued were [8] issued in accordance with the petition.

I would like to point out that the orders are equally fantastic. The orders are attached as Exhibit B.

There is a preliminary statement that the trustee filed his verified petition. Then he says, "and it further appearing that a claim or charge for sales tax has been made or may be asserted"—of course, it hasn't been by virtue of the allegations in Paragraph V of the very petition—"Now, therefore, the Referee makes the following order: It is ordered that in the event the State Board of Equalization has or maintains a claim or charge for sales tax because of any sale made by the trustee or receiver * * *."

In other words, regardless of how it falls or where it falls, but if there is any tax, why, then, the State Board of Equalization must present and file herein its verified claim for the payment of said tax as an expense of administration.

When I presented this matter upstairs to the referees, I told them quite frankly that I did not pretend to be an expert in bankruptcy matters, and that I had researched this problem as thoroughly as I could, and that I had not found any statutory provision anywhere, and to the contrary all the bankruptcy authorities, Remington and Collier to the contrary, providing for the filing of a verified claim for an administered expense. [9]

I said to the referees and I said to Mr. Laugharn, if there is such a provision I want to know about it, because I won't be here opposing this order if it is proper.

I got no answer except that from Mr. Laugharn that he is relying on a decision which is not in point, because the jurisdictional questions were never raised, and it is a decision of Judge McCormick in the California Pea Products case. And that, to my knowledge, is the only thing that even gives color to the legality of the orders.

The Court: To what are you objecting, having to file a claim?

Mr. Sumner: No. Here is what I am objecting to: Every day in the week the State of California demurs to complaints in the State Court because they do not set forth a cause of action under California law, or because they are brought in the court

where there is no jurisdiction, or because the State of California has not consented to be sued.

Now, the basic issue here is something that Willoughby in his book on constitutional law, Am. Jur., and all say is not proper, namely, a suit against the State without its consent.

If I may bore your Honor with an extended quotation, I should just like to read from Am. Jur., which I think aptly summarizes the basic question involved here.

What Am. Jur. says is this: [10]

> "It is an established principle of jurisprudence in all civilized nations, resting upon grounds of public policy, that the sovereign cannot be sued in its own courts or in any other court without its consent and permission. It is inherent in the nature of a sovereignty not to be amenable to the suit of an individual without its consent, and this principle applies with full force to the several states of the Union. No suit, whether at law or in equity, is maintainable against the state either in its own courts or the courts of a sister state, by its own citizens, the citizens of another state, or the citizens or subjects of a foreign state, unless by statute it has consented to be sued or has otherwise waived its immunity from suit. The legislature"——

That is, the state legislature.

> "is the proper body to authorize suits against the state. The immunity of the state from suit applies where a contract or property interest of

the state is involved. It extends not only to actions in personam, but to actions in rem against money or property of the state, where the judgment will affect the state's control over [11] or diminish its property or assets by enforcing a liability against the same. * * * The doctrine rests upon reasons of public policy—the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered and the public safety endangered if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government."

That is 49 Am. Jur., 301-304. I believe I have cited it in my authorities.

"While a suit against state officials is not necessarily a suit against the state, within the rule of immunity of the state from suit without its consent, that rule cannot be evaded by bringing an action nominally against a state officer or a state board, commission or department in his or its official capacity when the real claim is against the state itself, and the state is the party vitally interested. * * * The state's immunity from suit without its consent is absolute and unqualified, and a constitutional provision securing it is not to be so [12] construed as to place the state within the reach of the process of the court."

Now, the California Constitution in Section 6 of Article 20 specifically provides that the State of California may be sued only in the manner provided for by statute.

In the Sales and Use Tax law it is specifically provided—we don't have to argue by implication—it is specifically provided that no suit by way of injunction or any other equitable process may issue for the purpose of enjoining the collection of the state tax. And the statute goes on to provide a method at law for contesting any erroneous tax.

We have here a situation where if the trustees file a complaint in the manner provided by the Federal Rules and issue the summons, and make personal service on the Board of Equalization, that would be subject to a motion to dismiss if they asked for injunctive relief, as they have here, because of the very elementary proposition as pointed out by the quotation from Am. Jur., that the State has not consented to that type of a suit. What Mr. Laugharn is trying to do, in my opinion, is to maneuver the Board of Equalization into filing a verified claim with the referees.

Now, if it did so, it might very well be that it had consented to the court's jurisdiction, and that is why there are cases involving the California Sales Tax in the Federal Reports, because the Board of Equalization did file claims. [13]

But, your Honor, it is, again, elementary, and that is why I say to me this entire proceeding below is fantastic, if you read Remington, and if you read Collier, and if you read any book on bankruptcy,

any one that I have been able to find, they point out that proofs of claim are filed for debts which are owing from a bankrupt up to the time the matter goes into the Federal Court. In other words, up to the time he files his petition.

As a matter of fact, Remington says precisely, in so many words, that the proofs of claim are not to be filed for administrative items. There is no provision in the Bankruptcy Act requiring anyone who believes that he is entitled to an amount from a trustee as an administrative expense for filing a claim.

The Court: What is your suggestion as to how administrative expense would be ascertained and paid, therefore?

Mr. Sumner: Very simple. Section 62 of the Bankruptcy Act makes so clear a provision for it that I don't think it is open to question. I would like to read just the portion of 62 which lays it out very plainly and very clearly. Section 62 of the Bankruptcy Act is entitled, "Expenses of Administration," and Subdivision (a)(1):

> "The actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their [14] payment, be reported in detail, under oath, and examined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred."

The Court: "reported in detail, under oath"; who reports them?

Mr. Sumner: The trustee. The trustee comes in to the referee, if he follows the Bankruptcy Act, in other words, he makes an accounting to the court and indicates the items of expense he has incurred, the liabilities he believes he has incurred or have been asserted against him, and tells the court, "Here they are." He may make his recommendation and say, "I don't believe we should pay this one, or that one." If he brings them in, the referee is supposed to review them and instruct the trustee either to pay or not pay some of the items.

That is what the Bankruptcy Act provides for the handling of administrative expense.

The Court: It seems as if, to start with, there was a practical problem involved, and the practical problem has now got into some legal problem. In other words, there must have been some practical reason for these orders. I take it that the referees wanted to clean up some of these estates that were pending. [15]

Mr. Sumner: If I may, your Honor, indicate that that is not the reason for these orders. As the referees indicated, after they heard my argument on the motion to dismiss, "We are going to protect the trustees."

As a matter of fact, I think the record before Judge Hunt is very illuminating as to the attitude of the referees below. I think the referees below joined with Mr. Laugharn in doing one thing, in trying to do one thing, and that is to protect the trustees in these cases, or the trustee in all these cases, I should say, from the normal procedure

which the Board of Equalization normally takes under the taxing statute.

The Court: What is that procedure?

Mr. Sumner: In other words, let us put it simply this way: It may be upon review of any of these matters that the Board of Equalization may make a determination that some tax is due from somebody.

The Court: You mean sometime in the future?

Mr. Sumner: That's right.

The Court: After the estate has been closed here in the bankruptcy proceeding?

Mr. Sumner: That is correct. And in that connection there is something——

The Court: Let's pause just a moment. That would be a very poor way to do business, wouldn't it? [16]

Mr. Sumner: That's right, and that is why we attempted months ago—I personally went up to see the referees, I wanted to get a rule adopted that all the trustees would be required to notify the taxing agency before they closed the estate so that the taxing agency could come in and assert any administrative liability, and the reason why I was in to see the referees was because the trustees weren't at all interested in notifying the Board of Equalization when they closed these estates, and for years they have been closing them without notifying the Board of Equalization, and when the Board of Equalization got around to it they said, "It is too bad, the estate is closed."

The practical reason behind these orders is

merely this, Judge Carter: It is possible under an interpretation of the California Sales and Use Tax law that a man like Mr. Sampsell, who had handled 30 cases, at least, as we see here, who has sold that much property, who regularly engages in the business of making sales of tangible personal property, might possibly, as an individual, be subject to the California Sales Tax.

Of course, as your Honor knows, whether or not he is is not something that can be decided arbitrarily by any Board or officer of the State of California, but would of course be decided by the courts of this State, and perhaps the United States Supreme Court. But Mr. Laugharn as attorney [17] for Mr. Sampsell feels that he doesn't want to run the risk of ever having the State of California get a proper judicial determination through the State Courts, and perhaps the United States Supreme Court, of this question, so he devised this scheme of getting these orders to compel the Board of Equalization to file any claim they might have against Mr. Sampsell as an individual in the Federal Court.

The Court: Just a minute. If, for instance, some State Court were to hold that Mr. Sampsell owed a tax to the State as a result of some of his activities while he was acting as trustee, and the judgment in the State Court became final, there is not much doubt in my mind but what it was an expense incurred while he was acting as a trustee in a bankruptcy matter, and that a Federal Bank-

ruptcy Court would order that paid out of the assets in the Bankruptcy Court.

Mr. Sumner: It might not be.

The Court: I haven't looked up any law on it, but I am trying to see what would be logical. That would appeal to me. I don't think a man who is a trustee should be required to personally pay a tax imposed upon him for duties he carried on while he was a trustee.

You, apparently, argue for a position that would permit you at some subsequent date to come in and say to Mr. Sampsell, "Here, you owe so much money as a tax." Meanwhile Mr. Sampsell has closed these estates, what money there was [18] available has been distributed to the creditors and the matters have been closed, whereupon Mr. Sampsell would be out of pocket whatever amount would be determined to be the tax that was to be paid.

Mr. Sumner: In which event he would be in exactly the same position that every individual in the State of California is when he is told that he may be subject to a tax and doesn't take the precaution of collecting reimbursement to protect himself. There would be no difference. There are hundreds of people who find themselves in precisely that position because they don't comply with the California law.

The Court: As I understand your procedures over there, a man has no way of ascertaining if he can get his release, anyhow, from your organization. He has to make some kind of a deposit, and months later maybe he can get his money back, or maybe

it isn't worth the effort to try to get the money back.

Mr. Sumner: You are talking about the normal refund suit procedure. In other words, the normal procedure for a refund suit under California law is for payment of a determination, and a suit for refund after administrative hearing.

In this case, of course, there is no indication on the part of the petition that there is, even, any liability. We are just going into this discussion of the tax problem [19] and tax consequences purely in theory. But this petition, Paragraph V, makes it clear that he says he is not liable.

The Court: What has been the practice of the State Board of Equalization? Do you file claims, or have you written letters to trustees notifying them that you claim a tax due, or have you just sat back and done nothing?

Mr. Sumner: Wherever the Board of Equalization found out about an estate, they did make an audit and present a notice of determination, which is the State's assessment, to the trustee. That has been the practice. And in some instances some of the State taxing agencies have mistakenly filed what they call administrative claims, and the referees have, on occasion, when it hasn't appeared to be material to anybody's well-being, pointed out that of course it isn't really a claim. But the practice has been wherever there is an administrative tax item, to make a determination in the normal manner. In other words, indicating on the notice of determination, "John Jones, Trustee in Bankruptcy

in the Estate of So-and-so." That has been the normal practice over the years.

As a matter of fact, in all these thirty cases, if Mr. Laugharn had written a letter or called the Board of Equalization and said, "We would like to close these thirty matters very shortly, will you please audit these matters and make any determinations if there are any, or notify us [20] that you don't intend to make one," the Board would have been very happy to comply.

The Court: What is the difference between writing that kind of a letter and being served with an order to show cause?

Mr. Sumner: The same reason that we go into court and file demurrers to complaints that don't state a cause of action.

The Court: I have your point in mind. But as a practical matter, what is the difference between the letter you refer to or the order to show cause? If you went through the list of thirty cases and found fifteen of them you knew you had no claim in, and you called up on the phone or wrote a letter and said, "As to these fifteen there is nothing, close them up; as to these other fifteen, we want to make some audits, put your order to show cause over for thirty days," isn't that a business-like way to handle it?

Mr. Sumner: That is right, but these orders don't provide for it. They provide for the filing of a verified claim.

The Court: It merely starts some procedure before the referee so that, therefore, it can be handled

in a business-like manner. You can come in before the referee and say, "We can't get our claim in within this five or ten day period, we want thirty, sixty days," and if you were in good faith [21] and made your showing that you wanted to audit something, I think the Referees would give you that time.

Mr. Sumner: But still there is the one point, these orders don't provide for just notifying the trustee, but actually these orders provide for the filing of a verified claim, in other words, a claim in bankruptcy, and they also provide that the referee shall have jurisdiction to consider it.

They are trying to do with administrative items exactly what the Bankruptcy Act provides with claims against the bankrupt.

The Court: Who do you think should determine the administrative expenses in a bankruptcy proceeding?

Mr. Sumner: The referee. But we are not parties to that proceeding and we make no claims. How can the referee issue orders to a State, which is not a party to a bankruptcy proceeding, on a matter which is not a bankruptcy matter, that is the individual liability of the trustee, and furthermore require the State, without personal service, contrary to the well-settled constitutional principles to either file a verified claim or forever be enjoined and restrained from collecting any tax which may be computed on that sale regardless of how, when, where or to whom?

If that order were valid it would mean the State couldn't even collect it from the purchaser. [22]

The Court: I don't know whether I would go that far with you or not.

Mr. Sumner: It is fantastic.

The Court: I get your point. Your main contention is that when this order to show cause was served——

Mr. Sumner: By mail.

The Court: You appeared on it.

Mr. Sumner: Just by motion to dismiss.

The Court: Then an order was made restraining the State Board from ever asserting a claim, that that became in substance an action, and you couldn't issue an injunction without the equivalent of an action, and therefore you were being enjoined.

It seems to me like sort of a tempest in a teapot. It seems to me like business affairs in courts have to be handled in some orderly manner, and it seems to me that the referees struck upon what looks like a clearly orderly manner to see that any claims that the State Board might have would be filed in some orderly way.

It is a little hard for me to get excited about the thing, because from a practical standpoint it seems like it was orderly procedure.

Sometimes practical procedures aren't legal, and there may be constitutional defects in them.

Of course, if that is true, then no matter how good the [23] purpose may have been the proceeding would fall.

However, as I say, I can't get too excited about the thing, because it does strike me as being the

practical, orderly, reasonable way in which to approach this problem of claims.

Mr. Sumner: Of course I might say this: As I pointed out below, no such order is being made as to all parties who assert liability; it is picking out the State, in violation of clear constitutional principles.

The Court: What other persons are asserting claims?

Mr. Sumner: I don't know. In other words, it is just discriminatory in the sense that it is picking out the sovereign State of California as the one party to come in and file claims, and no other individual. I am sure the landlord, if they had some premises there and had to keep property there, they didn't compel him to come in and file a verified claim.

The Court: Of course as to creditors, by statute they have to come in at a certain time. As to those persons who claim expenses during the course of administration, I am not familiar with whether they do or not. But the reason the State Board stands in a different position in this contention based on State statute, which says you can come in at some later date and open the matter up and assert your claim.

Mr. Sumner: May I interrupt? It is not a question of [24] opening up these bankruptcy estates.

The Court: No. You just assert a claim against a poor trustee who has paid out all the money to the creditors and has no money left in his posses-

sion, and you assert a claim against him and say, "Pay it."

Mr. Sumner: And that is a claim which I think could not be paid by the bankruptcy estate even if it were asserted during the administration.

If we had a tax claim that was entitled to priority, and forgetting all the legal hurdles, if Mr. Sampsell did get a determination from the California State Supreme Court that he was liable for the tax, and he attempted to charge it against any one of these estates, and if we had claims that were entitled to priority under Section 64, I would definitely oppose allowing that as an expense of administration, because he has not attempted to do what every citizen in the State of California is required to do, and that is secure reimbursement and protect himself.

I have suggested to Mr. Sampsell, he has been in my office, months ago, that he collect the tax, the law permits him to secure reimbursement, and follow the statutory method set up by the State, in which event he couldn't be hurt.

The Court: What is that method you suggested?

Mr. Sumner: The California Sales and Use Tax law provides that when anybody sells tangible personal property at retail, [25] and is subject to tax, he shall in so far as he is able require reimbursement from his vendee. In other words, if Mr. Sampsell tomorrow sells something for $100, he can secure $103 from his vendee and hold the $3 so he won't get hurt. In other words, the California

statute completely provides for the protection of any man who asserts that he is not a retailer.

If there is any valid attempt, any honest attempt to comply with the law, no one is going to get hurt.

We have here, in my opinion, an outrageous disregard of the California taxing statute and no attempt to comply with it or to arrive at a reasonable working basis with the State Board of Equalization or the State Board of California, but just, as I say, a formal attempt here, in my opinion, to require the State Board of Equalization to come in and file claims before the referees and have them decide them.

The Court: If it was determined finally that there was no tax due from these trustees for sales in liquidation, that would dispose of this whole matter, would it not?

Mr. Sumner: If who found that, your Honor?

The Court: Supposing it was determined by a court of last resort, that would determine it?

Mr. Sumner: That's right.

The Court: Is it the intention of the State Board to appeal from Judge Weinberger's decision? [26]

Mr. Sumner: Definitely.

The Court: That will go to the Circuit.

Mr. Sumner: Yes, to the Circuit Court.

The Court: We will say the Circuit affirms Judge Weinberger, then what do you intend to do—seek certiorari?

Mr. Sumner: Yes.

The Court: What if the Supreme Court denies certiorari?

Mr. Sumner: Then we will concede that in so far as the factual situations involved in the Weinberger case, they are right. But I may say this, your Honor, with all due respect to Judge Weinberger, and I don't pretend to know anything more than Judge Weinberger does, and I don't pretend to be as good a lawyer, but it is my feeling that that decision is wrong in many respects on the record in that case. Some of the decision is definitely in conflict with the record, and I personally shall be very much surprised if Judge Weinberger's decision stands all the way up.

But that, of course, is neither here nor there. If it is affirmed all the way up, then it will be clear that trustees in bankruptcy in a particular estate are not liable for sales tax on liquidation sales made by them. That is what that case will decide, but no more. And that will still leave us with the problem——

The Court: Are you content to have that decided in the Federal Court system, or is it going to be your contention [27] that it has to be decided in the State Court system before you are finally through?

Mr. Sumner: I find myself in this ambiguous position. I didn't handle the West Coast case, and there is a question in my mind as to whether or not there was a consent to jurisdiction. My recollection is that a claim was not filed, and counsel that handled that matter did not object to jurisdiction,

he did not move to dismiss the order to show cause, and it may very well be—of course that may not settle the jurisdiction, because I believe there are some cases which say where there is no jurisdiction the Attorney General of the State cannot confer it. But, as I say, this proceeding here is not a tax matter——

The Court: You haven't answered my question. Is it your contention that this problem has to be settled in the State Court, or that it can be settled in the Federal Court?

Mr. Sumner: My contention is it should be settled in the State Court. As the Ninth Circuit Court has said very often—the last decision I know that it said it in the Renauld matter, a bankruptcy matter that went up on appeal—they pointed out that they always preferred to follow State law if there is any. Whether or not the State law is applicable is a question which the Federal Courts always have stated they would like to have the State Courts decide. They always hate to decide something which is purely a matter of [28] State law.

But, of course, an individual liability, your Honor, is wholly outside of the jurisdiction of the Federal Court.

The Court: Another thing, are you properly before this court on this motion to set aside and vacate and dismiss these orders of the referees?

I am kind of green in these matters, but ordinarily when a referee makes some order, and you participated below, you may have appeared spe-

cially, or I don't know how you appeared down there——

Mr. Sumner: A motion to dismiss only.

The Court: What I am getting at is, ordinarily the referee sends up a certificate, which is about the equivalent of a record on appeal, which says, "Here is what went on below, and here is what happened, and here is why I made the order I made." I don't have any of that before me. I don't know, except from what you tell me, whether you were in there with a general appearance or a special appearance raising a jurisdictional question. Apparently you have short-cut the customary procedure to review a referee's order and have come in here directly on motions. Now, maybe you are properly here. I understand the referees are appointed by the District Court to perform duties under the supervision of the District Court. Apparently a District judge would have the authority at any time to take over from a referee the things that a [29] referee is doing. In other words, the power of a referee stems entirely from a District Court.

But, on the other hand, there seems to be a regular procedure to send up these cases by certificates on review. That is not present.

Do you think you are properly before this court on this motion?

Mr. Sumner: I think so, your Honor. I gave that a lot of consideration. I notice the memorandum Mr. Laugharn handed me before court started indicated that he thought Section 39(c), the review

method, should be followed. Actually I would have come in here directly without going before the referees on motions to dismiss, but I thought in view of the fact that we had no opportunity to tell the referees our thoughts on the subject, that they might perhaps want to vacate their orders below on their own, so I came in below. The only thing I did below was I came in with a motion to vacate and set aside and dismiss on jurisdictional grounds. And inasmuch as those orders are void, and to my way of thinking beyond the jurisdiction, clearly, of the referee, after reading all the authorities it appears to be clear that the proper way to attack that is by way of a motion to dismiss. And I want it to be very clear that we are in these matters only on motions to dismiss. We will not appear in these matters and we will not file claims in these matters. [30]

The Court: Let's hear from Mr. Laugharn.

Mr. Laugharn: If the court please, I know that the court hasn't had time to read our memorandum which we handed in after you called this case, and the reason that we didn't get it in sooner was that the time seemed to be quite short, and because of the week-end the girl didn't finish the final typing until Saturday morning. What I am going to say now I have said since 1933 upon many occasions. I don't know that there is anything new that I am going to say now that I haven't said before, except reference to the Ninth Circuit and its decision when it passed upon this and restrained the attempted collection of the tax, and also the recent decision

of Judge Weinberger, in our opinion a very outstanding presentation of tax law in bankruptcy estates, and the decision of Judge McCormick in '41 or '42. Other than that I have no new ideas.

I believe I have talked on this subject matter at least twenty working days of eight hours a day. I don't believe that I am exaggerating on it. Starting in 1933 every time that the State Board of Equalization had a new attorney we met the problem anew. Our office took it to the Ninth Circuit, we joined as amicus curiae before Judge Weinberger, I met the problem myself in over 3,000 bankrupt estates wherein I was trustee, I met the problem hundreds of times while I was referee, and I am now meeting it in support of [31] the trustee's position.

I know from the questions the court asked that the court sees the position of the trustee in this matter. I believe that by a short presentation I can bring the court up to date on these recent decisions with which possibly the court is not familiar. They are set forth. The whole question is should the Bankruptcy Court, should the federal process of liquidation of creditors' rights, pay to the individual States a tax on that liquidation process? That is the whole question. And the court may rest assured that if it is to pay that, the estate is to pay it, it will be paid.

I am meeting this now more or less as a personal matter, it seems to Mr. Sumner's mind. My order, my prevailing upon the referee, my theory of the law.

I haven't any independent theory of the law that I don't support principally by Judge McCormick's decision, to which I will refer.

If there is such a tax, it is an expense of administration, and it must be paid under the provisions of Section 64(a)(1). No one will be embarrassed if that is the result. It will be paid along with other various expenses of administration. But if it is not a proper tax to be paid in this federal process of liquidation, then it will not be paid, Mr. Sumner to the contrary. It just will not be paid. [32]

It is our contention, it is the contention of the referees, that the tax cannot be levied upon this bankruptcy process. And that is the heart of the case.

I believe that I could present this matter more rapidly and not overlook any of the presentation if I could refer to my response.

Upon behalf of Paul W. Sampsell, trustee in the above-entitled bankruptcy estates, there is filed herewith the trustee's response to the Motion of the California State Board of Equalization to be set aside, vacate and dismiss Orders made in the administration of the said bankruptcy estates by the referees in bankruptcy of this court.

Inasmuch as some question may exist as to the nature and legal effect of the said "Motion to set aside, vacate and dismiss void orders," the trustee in appearing in opposition thereto does so upon the assumption that the so-called motion is in effect a Petition for Review.

I know of no way that this could get before the court other than by a petition for review.

There is one other provision, exercised by Judge Yankwich in the famous Owl Drug case, when he exercised the prerogative, very rarely exercised by a District Judge, of revoking the reference on a particular matter and hearing it directly, as the judge can do, because it goes to the referee on the reference, and, of course, he may revoke any part of it. It [33] was a question of fees and matters of policy.

Otherwise I don't know how the matter could get here.

I don't want to place this argument, though, upon that technical basis, unless the court feels that by this process, by bringing this matter up, there has been an affront to the referees in not letting them speak in this matter, in not letting them send their orders forward and be by the order to show cause rather peremptorily brought into this matter to show cause why orders they have made are not to be considered as void. Unless the court feels that for the purposes of this record there should be the petition for review and the referee's certificate before the court, we will not urge the matter further.

In the administration of the said bankruptcy estates, upon the petitions of the trustee, orders were made which provided in part as follows:

Then I will not refer to that, but the effect of it is to bring before the court the claim of the State; not have it walking around as a threat in

Mr. Sumner's brief case, that after the bankruptcy proceeding is closed there may be a suit filed against the trustees individually. This is seeking out the claim. The order is the main thing. It could have been made ex parte, and many times is made ex parte without a petition. It is, in effect, a bar order, as I will refer to it hereinafter. It is the same type of [34] order that Judge McCormick made. Come forward with your claim of expense of administration, so that it may be considered, allowed, and paid along with other expenses of administration. That is the effect of the order.

The order provided—one arbitrary feature here is that it be filed in twenty days, and at the time of the issuance of the order the referees stated that if the State Board wanted additional time because of the press of business, it could be granted.

After the issuance and service of the said orders, a motion was filed before the respective referees in each of the said cases by the California State Board of Equalization to vacate and dismiss the same and an Order to Show Cause was issued by the referees requiring the trustee to show cause why the said orders issued upon the trustee's petition should not be vacated.

That, while the same type of motion as here, was not quite as unusual as this motion, because it came back before the referees and presented the problem of whether or not they should set their orders aside.

Incidentally, that motion to vacate, motion to change, motion to make another order, does not stay the running of the time to review, and that

has been ruled upon by this court many times. So there might be a technicalility as to the right of the petition to review. [35]

If there is, we would waive it on behalf of the trustee.

The Supreme Court has said that while Section 39 refers to a ten-day period of time to review, it is within that time a matter of right, and beyond that time it is a matter of discretion.

And in so far as there is any question there, we would waive it and ask that the review be granted, if the court directs that course to be followed.

The said motion and Order to Show Cause was brought on for hearing by the California State Board of Equalization and at the separate hearings thereon before referees in bankruptcy, Dickson, Brink, Head and Hunt, the referees all made and entered the following identical orders, to wit:

Now, that order is, in effect, dismissing this motion to vacate. But the referees all took the same position, that the time should be extended, so that there be no misunderstanding on the filing of any claim asserted by the State Board of Equalization.

Then I comment upon Section 39(c) and Section 39(a)(8) on the review. I don't believe it is necessary to go into that further.

In each of the bankrupt estates the respective referees have made Order Confirming Sales of personal property by the trustee. The question thereupon arose as to whether or not by virtue of said sales so confirmed by the bankruptcy [36] courts, the trustee in bankruptcy should pay to the Cali-

fornia State Board of Equalization a sales tax.

In none of these cases was the trustee conducting the business. The sales were liquidation sales.

The trustee admits that sales arising in the continued operation of the bankrupt's business are subject to sales tax and payable as provided in the sections referred to usually as 124(a). That is where the receiver or trustee operates the business, he is liable to the same taxes as the original individual would be.

It is interesting to note that that came in in 1934. It was the result, as I recall, of a receiver in Missouri operating an oil property, and it was determined that since he was a receiver in bankruptcy, and since it was a bankruptcy matter, no tax need to be paid for operation, and Congress then, when that point came up, made this amendment. And, of course, there is no question about this. Any time the trustee operates, he is very careful to see that he pays the tax.

It is admitted that expenses incurred by the trustee are "expenses of administration." Sales tax or any other taxes or expenses would fall in that classification.

Expenses of administration are payable under the provisions of Section 64a(1) and thereafter the distribution follows to wages, taxes, and other debts, and so forth. [37]

The Court: What is Section 64a(1), a section of what?

Mr. Laugharn: That is of the Bankruptcy Act. That is the distribution section.

Any sections I have referred to are from the Bankruptcy Act.

The Court: That is not the U. S. Code section?

Mr. Laugharn: It is a transposition there.

The Court: There is a list in the front that gives you the transposition?

Mr. Laugharn: Yes.

In the administration of the bankruptcy estates before the referee, the first order of payment upon distribution is those items in class (1), to wit: The expense of administration. If a sales tax is owing by the trustee, or in fact any other bill, it falls in this class.

There is no order of priority within the class.

I might say there might be a qualification of that, where the last expense in certain cases where it has been to preserve and distribute the property in a known insolvent liquidation is paid first.

I didn't qualify that because I was just referring to it in this general nature.

It is therefore imperative that the items of expense of administration must be ascertained, revealed and brought forward for the approval and order of payment by the referee [38] before the estate can proceed in distribution and make payment to creditors, who were in existence at the date of bankruptcy and in their respective order of priority.

If there is any such sales tax payable, it is an expense of administration under Section 62 and to be paid under Section 64a(1). In general bankruptcy practice the expense of the trustee's ad-

ministration, to wit, employment of adjusters, advertising, expense of sale, and so forth, is paid direct by the trustee and he reports the same to the referee in his report and his account, the approval of the report being the approval of the said disbursements. However, in disputed matters in connection with rental claims for occupancy of the premises by the trustee wherein there is usually a ground of disagreement, and in those matters the said charge is reported to the referee for payment. This follows because the trustee does not want to be subject to surcharge in making payment in those matters wherein the referee will not authorize or approve the payment.

Thus in connection with sales taxes claimed upon liquidation sales of the trustee, the referees have consistently held that those taxes cannot be paid. Parenthetically, we might observe that where the trustee operates and carries on the business, the said sales tax is paid without question.

The Court: Now, let me interrupt. For some time, I take it, referees have been refusing to allow a sales tax [39] on liquidation?

Mr. Laugharn: Yes, always.

The Court: Haven't any appeals been taken?

Mr. Laugharn: Yes, and I will cite those cases.

It is contended, however, that recently the Sales Tax Act has been amended to change the complexion of those cases, but up to the present time—I wouldn't say the tax hasn't been paid, because there might be an occasion where a very small tax has been asserted, and the referee has said, "Well,

let's pay the $3.00 tax instead of having $300 of expense." There may be some cases of that sort. I don't know of any, but I know there are some on the same theory in the telephone cases in Chapter XI, where it is contended that to get the service you must pay the back bill. The courts have held that you don't have to do that, to pay the back bill, but I know of cases where it has been done as a matter of expediency.

Inasmuch as the Bankruptcy Court has jurisdiction over the distribution of its funds, it follows that the contended expense of administration, to wit, the claim for the said tax, may be "called in" before the court. That is just what has been done in the instant case, wherein the said taxing agency has been requested to present such claim or charge as it may have for the said sales tax to the referee. It is obvious that if the said claim is so presented that then and [40] in that event the trustee will bring on appropriate objections thereto, placing the same in issue and the trustee will contend that if the tax is so payable it be paid from the cash assets in the hands of the court and being so paid, if finally ordered paid, the trustee will be protected in his individual capacity.

To turn now to the instant problem, we find the trustee in all of these cases ready to close the administration—I believe that is a general statement that I can make; there might be a case or so in this group where there are other problems, but generally the group of cases was selected with that thought in mind—and to distribute under the order

of the referee the funds entitled thereto. This is a court function, established by the Bankruptcy Act, and the one in which the creditors are most interested. In the present cases the referees, during the administration, had made orders confirming sales of personal property. The questions then arose: (1) Should a sales tax be paid to the California State Board of Equalization upon the said liquidation sales? and (2) What was the amount of said tax? The trustee as aforesaid contended that there was no tax. On the other hand, during the past recent months in Los Angeles, the California State Board of Equalization has indicated through its agent and through Edward Sumner of the Office of Attorney General of the State of California, that [41] such a tax should be paid.

I was criticized before the referees as stating that it was threatened that the trustees could be made individually to pay this tax.

I believe the threat was almost in the same words, if it was a threat, that Mr. Sumner made here, and the choice of the word "threatened" I believe is poor on my part, and I will change that to say that there is the indication that the trustees can be proceeded against personally.

We have pointed out that this situation prevailed in Los Angeles, although it is common knowledge in bankruptcy practice that the said contentions are not being made within the United States District Court, Northern District of California.

I want to qualify that by "not being made in the same manner."

Here is a copy of a letter from the District Tax Administrator, State Board of Equalization, I believe it is to Referee McGuggan, stating it is their policy when a trustee makes three or more sales in liquidating the estate of the bankrupt retailer, even though he has not continued the business it is believed that such a series of sales is sufficient in number and scope and character to constitute an activity requiring the holding of a seller's permit.

But here the question is raised even on one sale, and [42] up there there seems to be a qualification.

The Court: I think we will take a short recess. The reporter has been going pretty steadily.

(A recess was taken.)

Mr. Laugharn: Continuing on page 7, in referring to these demands which are made on the trustee, or possible claims against the trustee, such demands against the trustee are most serious, especially the contention that the trustee could be held in his individual capacity therefor.

That is a rather serious matter, and I believe that it is rather uniform that the trustee should be protected in this matter.

The query should be, first, is there the tax, should it be paid, and if it should, then, of course, order it to be paid, and not require the trustee, whose compensation, incidentally, was fixed in 1898, to undertake a personal responsibility in connection with it.

I have found that is the attitude of the judges, and that is the attitude of the referees.

The trustee herein thereupon brought the matters

before the particular referees before whom the said cases were pending in administration. The referees unanimously concluded that if such a sales tax was properly chargeable to referees' liquidation sales, that it would be an expense of administration and should be ordered paid in the administration. And, further, [43] that the trustee should thus be protected in his individual capacity and that it would be unfair and inequitable for the referee to order the trustee to disburse the funds and close the estate with the said continuing threat by the said taxing authority of the collection against the trustee in his individual capacity.

The expense of administration in bankruptcy proceedings is dealt with under Section 62, which provides, in part:—I will not read that.

While this rule is statutory, it is inherent jurisdiction given to the courts which administer the res. In other words, the funds in the custody of the court, whether it be an equity receivership, corporate dissolution, a common fund in which many are interested, or a bankruptcy proceeding being within the control and jurisdiction of the court, may be chargeable by that court with the expense of administration thereof.

Thereupon, as aforesaid, the referee in the respective cases made the said orders that in the event the California State Board of Equalization "has or maintains a claim or charge for sales tax because of any sale made by the trustee or receiver in the administration herein pursuant to Order Confirming Sale of the referee herein, and so forth, present

and file herein its verified claim for the payment of the said tax as expense of administration within twenty days, [44] and so forth." And then follows the bar order in the event the claim was not so filed. These orders all became final. Thereupon there was no review filed, and so forth.

I have discussed that feature of the matter.

The attention of the court is called to the recent opinion rendered by Judge Jacob Weinberger in this court in the matter of West Coast Cabinet Works, Inc., Bankrupt, No. 44,249-W. In that case the same problem confronted the trustee. Reading from the first paragraph of the lengthy opinion we see the similarity of the two proceedings:

> "The Board of Equalization of the State of California has petitioned to review an order of the referee in bankruptcy permanently enjoining the said Board from enforcing as against the trustee or the bankrupt estate herein any of the provisions of the California Sales and Use Tax Law in connection with certain sales made by said trustee in bankruptcy."

The Court: In that case did the State Board file a claim?

Mr. Laugharn: I don't believe it did. I will show how Judge McCormick treated that situation in the California Pea Products.

We have been at loggerheads for years. The State Board contends the tax should be paid; the trustee contends it [45] shouldn't be paid; and usually the way these matters arise is by the order to show cause that there is no tax owing. The bar

order plan, I think, was used by Judge McCormick in the California Pea Products.

In that case—now, this is in the case before Judge Weinberger, and this is the one that counsel has stated will be taken up on appeal. In that case the referee made an order permanently enjoining the said California State Board of Equalization from asserting its contended sales tax against the trustee or the bankrupt estate. The said Board thereupon filed the conventional Petition for Review and the matter came on for hearing before Judge Weinberger resulting in his decision that the order of the referee should be affirmed; that the referee had jurisdiction to issue injunction, and that the same was proper; that the trustee had no plain, speedy, or efficient—and he uses the word "efficient" instead of "adequate" there—remedy in the courts of the State of California to cause a determination of the said matter. The case squarely presents the question as to whether or not under the present California statute a sales tax may be levied upon bankruptcy liquidation sales.

The same problem was presented in the case of California Pea Products, Inc., 37 Fed. Supp. 658; 45 ABR, New Series 393, of this court, likewise upon almost the identical facts, [46] and it is interesting to note that in that case the said Board followed the provisions of the Bankruptcy Act in bringing the matter before the District Court. An order was made by Referee Ben E. Tarver at Santa Ana that the Board be restrained from proceeding against the said estate or L. Boteler, the trustee

thereof, for the collection of the contended sales tax based upon liquidation sales made by the trustee.

The same general situation as here.

A Petition for Review was filed to the order of the referee and the matter came on for hearing before Judge Paul J. McCormick of this court. Quoting from portions of the opinion of Judge Paul J. McCormick:

> "The referee's order and injunction are attacked solely upon two grounds: (1) that said trustee in bankruptcy, L. Boteler, was selling on behalf of the bankrupt California Pea Products, Inc., machinery and equipment at retail within the contemplation of the California Retail Sales Tax Act, and (2) that an injunction against the State Board of Equalization will not lie for the reason that the said trustee in bankruptcy has under the California Retail Sales Tax Act an adequate remedy at law by paying the tax and suing to [47] recover.
>
> "Preliminarily, it is pertinent to observe that the petition for review originally contained a statement that the State Board of Equalization had filed in this bankruptcy matter its claim for sales tax due the State of California, and a part of the prayer of the petitioner on review was that this court on the review overrule any objections to said claim of the State Board of Equalization and allow said claim in full."

Stopping a moment. In other words, that merely means this, that the record came up before Judge McCormick, and the original record appears as if the claim had been filed, and then it appeared that it had not, so he proceeds with the decision and makes remedy for it.

Continuing with the opinion:

> "By interlineations appearing upon the original petition for review, the aforesaid matters are stricken and are therefore not now a part of this review. It thus does not appear that the State Board of Equalization has filed any claim for retail sales tax or in fact for any other tax in this bankruptcy proceeding, or that any extension has been granted for the filing of any such tax claims. [48]
>
> "In view of such situation, it is unnecessary on this review to go farther than to determine the validity and proper scope of the injunctive order issued by the referee. And until a claim for taxes is filed in this bankruptcy proceeding by the State authorities, or until a 'bar order' is operative upon the State agency, the question as to whether the trustee in bankruptcy in selling tangible personal property in liquidation of the bankrupt estate is a retailer and a person obligated to comply with the provisions of Act 8493 of the General Laws of the State of California, is not properly before us.
>
> "It is, however, clear from the documentary evidence sent up with the referee's certificate that the State Board of Equalization had deter-

mined that the trustee was 'engaged in the business of selling tangible personal property, the receipts from the retail sale of which are subject to the sales tax,' and that such trustee was 'required by the California Retail Sales Tax Act' to secure a permit under the Act. Accordingly, demand was made by the State Board for the permit fee provided in the Act, and also that the trustee [49] file quarterly returns in accordance with the Act under a likelihood or implied threat of being penalized for non-compliance with the demands of the State Board, and possibly of being sued in the State Court for non-payment of taxes, or at least of encountering some interference by the State Board in the administration of this bankrupt estate. The probability of such an eventuality justified the referee in making an appropriate stay order. Section 2, Subdivision (15), Chandler Act. The possession of the property by the trustee is the court's possession, and any act interfering with the court's power of control and disposal and done without the court's sanction is void. Dayton v. Stanard, 241 U. S. 588, 37 Am. B. R., 259.

"The record shows that the trustee was not authorized by the Bankruptcy Court to conduct business under the permissive provisions of the Bankruptcy Act. Section 2, Subdivision (5), U.S.C.A. In fact, no application of any kind was made to carry on or to conduct business. On the contrary, all of the selling activities of

> the trustee in bankruptcy were purely liquidating functions and in no proper sense should be considered [50] in any other category.
>
> "The tax claims referred to in Sections 57(n) and 64(a) may be regarded as relating to matters and activities which have occurred prior to the filing of the petition in bankruptcy. The transactions upon which the State bases its contention in this review have all taken place after adjudication and the selection of the trustee in bankruptcy. The claims may therefore be considered as not strictly 'claims' against the estate within the contemplation of Section 57(n) and 64(a), but rather an expense of administration provided for in Section 62 of the Act. But the same power of adjudicating such 'claims' is vested in the bankruptcy court by Section 62 as in the matter of tax claims under Sections 57(n) and 64(a)."

Continuing Judge McCormick's opinion:

> "The Supreme Court in Kalb v. Feuerstein, 308 U. S. 433, speaking of the broad and plenary power of courts of bankruptcy said, 'The Constitution grants Congress exclusive power to regulate bankruptcy and under this power Congress can limit the jurisdiction which courts, state or federal, can exercise over the personal [51] property of a debtor who duly invokes the bankruptcy law.' "

That is the end of the quotation of that case. Now continuing the opinion:

"See also Arkansas Corporation Commission v. Thompson (C. C. A., 8th Cir.), 116 Fed. (2) 179."

Incidentally, that case went on to the Supreme Court after Judge McCormick made that decision. The effect of the case was, in general, that where a quasi-judicial body had determined a tax claim, and that was final, that the Bankruptcy Court in that instance did not have jurisdiction.

Continuing the opinion of Judge McCormick:

"When a general reference has been made by the judge to a referee, as in this matter, he is, under the Chandler amendments to the Bankruptcy Act and under new General Order 12, invested with complete jurisdiction of the proceedings, and the referee under such reference can do everything that the district judge can do, except certain specific powers which are reserved to the judge, but which are immaterial to this review or to the acts of the referee under consideration in this matter, under the factual situation shown by the record before us." [52]

Citing an authority.

"We think, however, that the injunction and order under review is too broad. Mention has earlier been made of the modified and restricted scope of this review as shown by the interlineations on the petition for review, and although the briefs of the attorneys seem to assume that the record before us is sufficient

and adequate to support a ruling determinative of a specific tax claim by the state board, no such claim has in fact been presented. There is, therefore, no basis for an injunction which so operates to preclude the state board from presenting and filing a claim and having the same heard, considered and allowed or rejected by the referee as the situation may warrant.

"Section 2(15) of the Bankruptcy Act empowered the referee to 'make such orders, issue such process, and enter such judgments—as may be necessary for the enforcement of the provisions of this title; provided, however, that an injunction to restrain a court may be issued by the judge only.' This statute, as well as General Order 12, effective February 13, 1939, is a rule of procedure relating to [53] the remedy, and is applicable to this bankruptcy matter and, particularly, to the injunction herein which was issued March 22, 1940. And in arriving at the extent of power that is conferred upon the referee by section 2(15), the concluding clause of the subsection is a clear investiture in the referee under a general reference to issue all injunctions in the course of the bankruptcy proceeding necessary to prevent the defeat or impairment of his jurisdiction except that only a judge can enjoin a court. It would have been a simple matter for Congress to have made the prohibition against the referee's power to issue injunctions general if such had been the legislative intent.

As no such intent appears but, on the contrary, only a single specific prohibition being shown, the referee is in all other instances vested with plenary judicial power to issue stay orders when acting under a general reference. See Collier on Bankruptcy," and so forth.

"We conclude by holding that the findings, injunction and order of the referee, dated March 22, 1940, are modified as follows: [54] The State Board of Equalization of the State of California, its officers, agents, employees and attorneys are, and each of them is, enjoined and restrained from in any manner enforcing or attempting to enforce any claim, tax, assessment, collection, penalties or sanctions provided in or pursuant to Act 8493 of the General Laws of the State of California against the estate of California Pea Products, Inc., a corporation, bankrupt, or against the trustee thereof"——

And this is rather important, because Judge McCormick injected this himself:

"or against L. Boteler personally, or against any property of said bankrupt, or of L. Boteler, or from in any manner interfering with the administration of this estate, without prejudice, however, to the presentation and filing of any claim for taxes by the State Board of Equalization of the State of California, its accredited and authorized officer, agents or attorneys, within the time allowed by law, and to having such claim considered by the referee

> and its legality and validity determined by him, or without prejudice to a 'bar order' of the referee." [55]

The Court: What do you mean by "within the time allowed by law"?

Mr. Laugharn: I was going to explain that. The time allowed by law, I believe Judge McCormick meant in this case was before the estate is closed. And I will cite a Ninth Circuit case that with knowledge of the pending administration there is an estoppel against the filing of a claim if they do not come forward within the time.

The Court: Well, that would seem logical.

Mr. Laugharn: Also, I want to call attention to the last words here "or without prejudice to a 'bar order'" and I will discuss the bar order theory.

That concludes the quotation from Judge McCormick's opinion.

It is apparent that there are two ways by which the problem can be presented before the referee: (1) upon the theory of a direct restraining order by the referee, and (2) upon the so-called order to file claims and "bar order," as in the matter now before the court. In the first instance, as in the California Pea Products and West Coast Cabinet Works, Inc., bankruptcy estates the restraining order was issued by the referee. In the present proceeding the trustee was willing to stand upon the "bar order," relying upon the case of the Ninth Circuit, McColgan v. Maier Brewing Company, March 10, 1943, 134 Fed. (2d) 385, which held

that [56] the failure to present known claims in bankruptcy proceedings necessarily results in their preclusion. In this matter California corporation franchise taxes accruing as a consequence of operation of a corporation by receiver after filing of an involuntary petition in bankruptcy were not provable debts owing by corporation itself, but were expenses of administration. and liability of the estate therefor was dependent upon their being reported and their payment directed by court order. The opinion of the Ninth Circuit recites:

> "The taxes accruing as a consequence of the operation of the business by the receivers were expenses of administration."

Citing a lot of authorities.

> "They were not provable debts owing by the corporation itself, but were obligations of the receivership. In respect of the payment of administrative expenses, the statute, 11 U.S.C.A., Section 102, subdivision a, provides that unless other provisions for their payment are made they shall be 'reported in detail, under oath, and examined and approved or disapproved by the court.'"

I would like to stop there, because the court asked that question a few moments ago, Reported by whom? [57]

I believe the statute means reported by the trustee. But the trustee would be reporting a negative here, in other words, he would be reporting there was not a tax payable and therefore he would

not put it in, and consequently this covers the admitted expenses.

There must, obviously, be a way to bring before the court for consideration those expenses which the trustee claims are not expenses and someone claims that they are, because the trustee is not a judicial officer, he can't determine those matters. Many times he contends he shouldn't pay certain bills, and the referee says, "Yes, you should," and orders them paid.

The Court: Isn't the statute broad enough to interpret that "reported" would mean to apply even to the person who claims them?

Mr. Laughern: I think so.

The Court: The statute provides for a method of hearing, it provides for reporting in detail under oath, an examination and approval or disapproval by the court, and if approved they shall be paid. There is a statute that complies with due process to provide a determination as to whether or not a claim shall be paid.

Mr. Laugharn: I believe that interpretation is possible and logical. I am not sure that the section was cast entirely along that line, but I see no reason why that interpretation [58] couldn't be put on it.

Then, continuing the Ninth Circuit opinion:

> " 'If approved, they shall be paid or allowed out of the estates in which they were incurred.' No other provision was made for the payment of these expenses. Thus the liability of the estate was dependent upon their being reported and their payment directed by court order."

The Ninth Circuit also passed upon the question as to whether or not the trustee in bankruptcy should pay sales tax in the case of State Board of Equalization of State of California v. Boteler. That is known as the David Standard Bread Company matter, 131 Fed. (2d) 386, November 10, 1942:

> "The trustee filed with the referee in bankruptcy a petition for an order restraining the Board of Equalization from attempting to collect this tax."

I would like to stop right there. I determined in going over this and trying to chart this course, that that was a little too peremptory, that the first order should be to the State "If you have a tax claim, file it," and then the next step, of course, would be determination as to whether or not there was legally a tax owing. I thought that was the best way to set the record up. I felt that the original restraining order, where there is no tax, there is nothing [59] before the court, would not be conducive to a good record if we went on up to the District Court or on to the Ninth Circuit, and, therefore, that course as followed in David Standard Bread Company, was not followed.

Incidentally, Mr. Tobin, my associate, spent many hours on this David Standard Bread Company matter, taking it up through the referee, the District Court, and to the Ninth Circuit, and I had asked him to be present if the court wanted any personal information on it. While I followed the case, I did not participate in it.

Under the subject of "Bar Orders," Remington on Bankruptcy, Volume 2, Section 798, in discussing "bar orders" states:

> "Prior to June 22, 1938, there was no provision in the Act making it obligatory for the United States, the states and subdivision thereof to file proofs of claim. Accordingly, a practice arose of entering bar orders fixing a time within which the claims of governments should be filed. The 'bar order' technique in respect to tax claims was a natural development. It was designed to accomplish two objects, to remedy two weaknesses evident in the application of the general rule that the United States was entitled to file its claim for taxes at any time during the pendency [60] of a bankruptcy proceeding and before distribution of the estate. It was developed, first, to permit an uninterrupted expeditious administration of a bankrupt's estate, and, second, to protect the trustee of such estate from liability to tax claimants in distributing assets in the course of his administration thereof. The technique is an extension of the policy followed in equity receiverships and has been considered in much detail in the second circuit. In re Swan, 82 Fed. (2d) 160.
>
> "In determining the legality and priority of tax claims, the Bankruptcy Act is paramount over other federal and state statutes. The bankruptcy court makes an independent determination of the validity of taxes in order to determine to what extent proofs for taxes should be

allowed. It is not bound by the determination of administrative boards."

I have just finished reading from Remington. That last statement should be qualified by cases which have been determined since the text was written in Remington. There is an extension of the theory that where there is the prior determination, as in the Arkansas case, or where there is the right to have the matter determined by a taxing board, to fix the [61] amount of the tax, and that is not followed, that the bankruptcy court may be barred.

I make that statement not because it is important here, but that the text is not full and correct.

We believe we have fully answered the question as to jurisdiction. We are attempting to clearly keep in mind the distinction between the question of jurisdiction and the question of law as to whether or not a tax is properly chargeable and accordingly should be paid. The decisions cited herein in this circuit clearly establish the jurisdictional question. Therefore, we believe we have fully answered points I, II and III.

We are not in dispute as to point IV—bankruptcy proceedings are proceedings in rem. As set forth hereinabove the trustee herein relied upon the power of the bankruptcy court to require the said claims be filed or barred. The order made ex parte, in the first instance, was challenged upon Motion to Vacate, and upon the hearing the Motion was dismissed and further and additional time granted for the filing of the claim. We believe this adequately disposes of points V, VI, VII, VIII and IX.

In answer to points X, XI, XII and XIII we rely upon the opinion of Judge Weinberger in the case of West Coast Cabinet Works, Inc., Bankrupt, referred to hereinabove and particularly pages 67 and 68 thereof—incidentally, that is [62] not a typographical error, not only 67 and 68 pages, but there are about 30 pages of the authorities, it is a very lengthy opinion—wherein he sets forth the reason why in his opinion there is no plain, adequate or speedy remedy for the trustee other than before the Bankruptcy Court.

In answer to point XIV, that there is no provision in the Bankruptcy Act authorizing a Bankruptcy Court to require the filing of claims for administrative tax liability, we refer to Judge McCormick's comments thereon in the Matter of California Pea Products case.

In answer to points XV, XVI, XVII, XVIII and XIX, that the court does not have jurisdiction to stay proceedings against the trustee in their individual capacity, we likewise rely upon Judge McCormick's opinion in the case last above cited.

We understand that it is the intention of the California State Board of Equalization to appeal from the decision of Judge Weinberger in the West Coast Cabinet Works, Inc., case. It seems to us, when the Ninth Circuit again speaks on the instant subject-matter, that it will follow its prior decision of 1942 in the Matter of Davis Standard Bread Company, and until that time bankruptcy administration and distribution of funds to creditors will come to a standstill if the California State Board

of Equalization persists in its present position, that it can and will attempt to hold trustees [63] personally liable in their individual capacity after they have disbursed all funds under the Order of the Bankruptcy Court.

In closing, the trustee again calls attention to the form and effect of the present Order of the Referee, to wit: they directed that the State Board, if it has or maintains a claim, that same be presented in the pending administration and that if it does not do so that it be barred. Accordingly, this will permit the closing of the estate. If it does file a claim, the trustee will then proceed with the laborious and expensive steps of objecting to each claim in each estate, and assuming there is the review therefrom as in the case of Davis Standard Bread Company, California Pea Products and West Coast Cabinet Works, Inc., bankruptcy administration will have to bear the terrific burden until a final solution is arrived at.

It is respectfully submitted that the present motion now before the judge to declare the Order of the Referee void and to strike them from the record in each of the said cases should be denied.

If the motion is so denied, the trustee will then meet the issue in the following practical manner: (1) if any claim is so filed, a hearing will be had thereon before the referee as to its allowability: (2) if no such claim is so filed, then the trustee will proceed with the administration [64] and distribution of the said bankruptcy estate.

I might add, further, that I have given the opinion

to the trustees that I represent that the trustees may do so with impunity, relying on the decisions I have cited, and particularly the estoppel procedures of McColgan v. Maier Brewing.

The Court: Mr. Sumner, let me ask you this: Your motion is essentially one raising a question of jurisdiction, and your main point is that the State of California has not consented to be sued or to be bound by any injunction?

Mr. Sumner: That's right.

The Court: Has not come into a proceeding where an injunction might be issued against them?

Mr. Sumner: Yes.

The Court: If your contention is good, how could a bankruptcy court ever clean up these estates? Here is a bankruptcy court that wants to clean up some estates, the State Board of Equalization is standing off to one side making a bunch of noises, "Maybe we have got some claims and maybe we haven't," but they haven't filed them in the bankruptcy proceedings. Unless a bankruptcy court adopted some summary method of saying, "Come in and file your claims or forget about them," how could those estates be cleaned up? You could stand off and wait the entire period of the [65] statute, whatever time the statute gives you, before asserting your claim to taxes.

Mr. Sumner: The answer to that is simply this: I think there is no basis whatsoever for anyone even intimating that the Board of Equalization wouldn't forthwith, I mean within days, get an auditor out there as fast as they could. It might take two days.

If any trustee called up and said, "We want to know if you have any claim against this bankrupt estate," I don't think——

The Court: That is what they did when they sent that order to show cause.

Mr. Sumner: It covers a lot more ground.

As a practical matter, your Honor, there is no problem as to claims against the estate. That is why these orders are void. That is one of the fundamental arguments.

The Court: You didn't take offense at the language of the order? You wouldn't have felt better, would you, if it would have been a nice letter saying, "Mr. Bonelli, will you kindly, please, at your convenience, and if you are so inclined, file your claims in these proceedings"? You don't take this position just because it was framed in the way of an order to show cause?

Mr. Sumner: May I say this, your Honor? If they had obtained orders from the referee saying, very simply, "Come forward and assert any liability you have by following the [66] process that you have been following for years, within 20 days, or be barred," even though I think it is improper, even though the Board thinks it is improper, even though we disagree entirely with that procedure, we would be happy for the referees to make that type of order in every case.

The Court: If you make that admission in your brief in the Circuit, and should this motion be ruled on adversely to you, you will be out of court, because that is exactly what this order did.

Mr. Sumner: That is exactly where I disagree, your Honor, because—unfortunately, we have again gotten into the tax question here, which should not be here. One thing that I think Mr. Laugharn overlooked in his presentation is this: When we say the trustee might be individually liable, we are not talking about secondary liability. I think it would be unconscionable for the State to refuse to file a claim in a bankruptcy proceeding, and then sit back and then proceed against a trustee because he didn't pay a claim out of the estate.

That is not what the State is after. We are not trying to harass these people. All we are aware of is the fact that Revised Title 28 sets forth the jurisdiction of the District Court. It says specifically in Section 1341:

> "The District Courts shall not enjoin, suspend or restrain the assessment, levy or [67] collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

As far as the trustee is concerned, that applies squarely.

Also 2281 which clearly provides, if they argue it is unconstitutional in its application, they have to get a three-judge court to rule on it.

The Court: I will take the matter under submission and read some of these cases.

Here is my tentative view on it: The Constitution of the United States itself provides for bankruptcy——

Mr. Sumner: That is correct.

The Court: ——so we have the Congress of the United States legislating on a matter contained in the Constitution. You have a little different kind of a statute than you have in many cases. Here you have a statute of Congress which wipes out a man's liability, it abrogates the right of contract, if you want to put it that way, and here are bankruptcy courts set up in an orderly manner to transact the business of the government under this particular phase.

It seems to me that, first of all, there would be a sound doctrine of laches, that if the Board didn't come in and file claims within a reasonable period of time, they couldn't come in later and assert them in one of these bankruptcy proceedings. [68]

I think that probably would be good law. Certainly, when the bankruptcy court lays out some procedure to expeditiously handle its business, I don't think the State can stand off to one side and say, "We can't be sued, you can't bind us with a stay order."

The only point that is really involved, the only reason that I am taking this under submission, is this question as to whether or not by issuing this bar order, whether that is the equivalent of suing the State without its permission.

You don't have to cite any authority on the right of the sovereign not to be sued without its permission. That is true both on the federal and state side. But I don't see that this bar order is the equivalent of that. It is true there is an injunction issued, but it is an injunction issued by the Bank-

ruptcy Court pursuant to its powers as a court to expeditiously carry on its business.

Certainly Congress didn't have to outline by statute everything that the Bankruptcy Courts had to do. There were certain general powers given, and it seems to me within the general powers given these Bankruptcy Courts would have the power to see to it that they expeditiously disposed of their cases.

Then, furthermore, you have to view this thing in the light of realities. Here is a court set up dealing with people who have suffered financial reverses, have gone [69] bankrupt, leaving a bunch of debts due creditors. The primary purpose of a Bankruptcy Court is to, No. 1, relieve that man of his obligations, and, 2, take what assets he has got and pay them to his creditors. And it should do that as promptly and expeditiously as possible.

Mr. Sumner: That is right.

The Court: If you are going to permit a situation where a State Board can say, "We have a tax claim but we can't be sued, you have got to come over to the State Court and adjudicate this thing if you want it adjudicated, you can't even fix a time limit within which we must present our claim," if you analyze your position you are going that far——

Mr. Sumner: We are not trying to.

The Court: But you are, you are taking the position that the Bankruptcy Court cannot even set a time limit. If that were possible, that sort of thing, you would be disrupting the entire theory behind the bankruptcy law.

As I say, the theory is to see that this is done expeditiously, that the man is discharged of his debts, and what money there is paid to these creditors who have suffered a big loss, as well as the bankrupt. It seems to me only common sense that the court should have a right to limit the time within which those claims be filed.

To my mind law essentially should be a matter of common sense. It is true occasionally you have statutes and rules [70] you have to follow, but on the whole the purpose of the legislature has been to set up common sense procedures, and the purpose of judges should be to follow common sense procedures. It seems to me almost just as clear as day and night that that court should have the right to say, "Bring your claims in by a certain hour or forget about them."

If you don't come in within that time, whether you have lost out under the theory of laches, or whether you have lost out under the theory that the court can make a valid bar order that carries an injunction with it, which is not the same as suing the State, or whether it can be justified on the difference of here the State is not being subjected to any liability, but it is merely being prevented from at a later date coming in and asserting a claim—I don't know what ground some Appellate Court might put it on—but I would wager a good month's pay right now that Appellate Courts on one or more of those grounds would uphold the bar order proceeding against the State Board of Equalization.

Mr. Sumner: What if in one of these matters

the State Board of Equalization in connection with one of these matters would have a claim against the trustee individually, but not against that particular estate, if these orders are permitted to stand, it would mean that even though the Board of Equalization has no claim against this estate, even though there is no [71] claim against this estate, even though there is no provision in the Act for the filing of claims, it would have to come in and file a claim against the estate, which it doesn't assert, or be forever enjoined against proceeding against the individual on the individual basis, which it does assert.

I would appreciate it, your Honor, if we were permitted to file a brief to really outline this matter and the consequences which follow.

As I indicated below, it will be my advice to the Board of Equalization not to file verified claims until I can find some authority for it, and I do not believe—as a matter of fact, I wish your Honor would read that California Pea Products case, because I think Judge McCormick realized that you don't file claims for administrative expenses. But I have indicated to the referees that I was going to advise the Board of Equalization not to file verified claims.

Let's assume that they don't, and let's assume that individual liability does exist and suit to collect it, if brought, would be in the name of the People of the State of California, if our motion to dismiss this is denied, would it mean that the People of the State of California could be held in contempt, or its coun-

sel, for bringing an action in the name of the People of the State of California to collect taxes under the State taxing statute against an individual in his individual capacity? I just don't comprehend it. [72]

The Court: If your argument for individual liability were sound, you might have a point. I don't think it is sound. If there is a tax due, you have it narrowed down now to a tax on sales in liquidation, there is no question before us now of a tax when the man is operating the business, in these cases it is solely a question of a tax on liquidation sales, isn't that true?

Mr. Sumner: That is not true, because we have one man who has been working in 30 cases, we have one man who is regularly engaged in doing a certain activity. You can't just chop this out. This is not the Weinberger decision case.

The Court: But these things he is doing are all liquidation sales?

Mr. Sumner: That's right, in any particular case.

The Court: Since they are liquidation sales, if there is a tax due it is an expense of the administration. You raise a theory that one or two sales might not subject him to the tax, but when he engages in 15 or 30 sales he, in substance, is engaging in an occupation and therefore there is a tax due.

Mr. Sumner: It may be.

The Court: But from the standpoint of the Bankruptcy Court, it is not looking at his occupation, it is looking at each bankruptcy. [73]

The trustee sold some property through liquidation, a tax is asserted; there is no doubt in my mind,

not the slightest doubt, that a Federal Court would hold that that was a tax payable out of the administration of the estate, if it was established, because this court could not go into this question of how many different sales he was engaging in, they wouldn't all be before the court at one time, the court would have each individual one before it. You might try to assert that there was a personal tax, but if you succeeded in fastening the tax on the trustee, it would be a tax because he engaged in a liquidation sale at a bankruptcy, and I am confident that any District Court would hold that it was payable out of the expenses of administration.

The difficulty would be, on your theory, that you could assert this right later on, the trustee would then be in a very bad position, because he has no funds to pay the tax with, and the court might say, "That is an expense of your administration," but where would he have any funds to pay it with? He might wind up having to pay it personally. It would certainly be an unfair situation.

I don't see that we can approach this on the ground that this is a personal tax.

Mr. Sumner: Your Honor, if I may just make one other point. I don't want to keep the court after the lunch hour. I see we are after 12:00. If you take a hypothetical [74] situation it will demonstrate how erroneous these orders are.

It may be, for example, a trustee, John Jones, handles a whole series of cases. In case No. 1 he makes one liquidating sale. As a trustee in his fiduciary capacity by one liquidating sale he may

not be liable for a tax, because it might possibly be an occasional sale. However, if you have an individual who has made one hundred sales during that same year of half a million dollars worth of personal property, it may be that that individual sale might be taken into account in the computation of his individual liability. Under these orders they don't just treat these cases individually, as Judge Weinberger did. If they had gotten orders in all these thirty cases along that theory, where they say in this individual estate the trustee isn't liable under Judge Weinberger's decision, he wouldn't be. But this isn't what this is. I would appreciate the opportunity of pointing out——

The Court: Has Mr. Bonelli passed on this matter personally?

Mr. Sumner: No, he hasn't.

The Court: You know, he is a pretty fair lawyer, and he has a pretty good head. I had some matters with him when I was United States Attorney, and I would be interested to suggest that Mr. Bonelli pass on this matter personally. [75]

Mr. Sumner: He was sued very recently in the State Court where a plaintiff tried to do substantially what Mr. Laugharn is trying to do, and if you will bear with me just another minute I will direct your attention to that case. Casey v. Bonelli, et al. It was decided by D. C. A. in the First District, August 5, 1949. It was an action by George W. Casey v. William G. Bonelli, and others, as members of the State Board of Equalization, for declaratory judgment that defendants have no claim which can

be asserted for Sales and Use Tax against a dissolved corporation of which he had been president; and that plaintiff be instructed that he is not required to defend and object to the determination of the Board that the corporation was liable for Sales and Use Tax, and for general relief. From an adverse judgment the plaintiff appeals and the judgment was affirmed. Dooling wrote the opinion.

What the court said is very interesting:

> "Under Section 6931, Revenue and Taxation Code, no injunction, writ of mandate or other legal or equitable process shall issue to prevent or enjoin the collection of any sales or use tax. The decisions are explicit that this and similar provisions prevent the resort to a declaratory judgment to determine that such tax should not be collected. * * * [76]
>
> "The allegation of the complaint quoted above makes it clear that plaintiff is seeking a judicial determination that he is under no fiduciary duty to take the steps provided for in Section 6561 and 6562, Revenue and Taxation Code, based on a further adjudication that 'any judgment obtained by the defendant against said dissolved corporation would be void.'
>
> "Appellant argues that the question is not one of tax law but of corporate law,"——

Here it is argued it is bankruptcy law.

> "and that the adjudication is necessary for his protection."

Listen to this:

> "However rationalized the fact cannot be disguised that appellant seeks a binding adjudication against the Board of Equalization and its members that he need take no steps because the tax cannot be legally collected from the dissolved corporation. Faced by such an adjudication respondents would be effectively barred from collecting the tax."

And they affirmed the judgment of the lower court.

The Court: Don't you distinguish, Mr. Sumner, between an individual and a set of bankruptcy courts set up under the [77] Constitution of the United States?

Mr. Sumner: That is why I said, to begin with, if these orders were restricted entirely to claims against a trustee in his fiduciary capacity, as an expense of administration, why, even though we think the orders are out of line as a practical matter, fine.

The Court: I wouldn't have much trouble, as a judge, in finding there was a distinction between the application of a statute like that to an individual that would require him to come in and pay his claim and would not be a burden on the State Board, and on the other hand, taking a different application when that particular agency came into conflict with a court system set up under the Constitution with the power to abrogate the right of contract and wipe out debts, and so forth. It seems to me they are two different things entirely.

Mr. Laugharn.

Mr. Laugharn: Could I just have one moment of rebuttal?

The Court: Yes.

Mr. Laugharn: I overlooked something. Counsel has brought it out, but I don't believe the court got the full effect of it.

There has been nothing said today that hasn't been fully said one hundred times before in these same matters, [78] other than the more recent cases. There is one thought, however—I must qualify that—and this to my mind is the most novel idea ever asserted in connection with statutory interpretation. The statute said, 124a—that was the case when Congress came in and said that it wasn't right to let its officer run a competing business with a business across the street without taxes, so it said there shall be the same taxes.

That section is the basis for this ingenious argument which was just touched on recently by Mr. Sumner, and was more elaborately before the referees, that "if a man is a trustee in more than one bankrupt estate, he is running the business as a trustee in bankruptcy, and therefore we may sue him, we don't know, we may sue him because of that."

This shows the peculiarity of it. Each bankrupt estate stands on its own feet, each trustee is a separate individual from the trustee in the other case, whether he is the same trustee or not; in fact, sometimes he sues himself, literally, where there are three bankrupts within one, the partnership theory. Just several ideas: the trustee's statutory

fee, if I can figure it mentally, is $1,140, that is what he works for—it takes him usually a year—in a $100,000 estate. So he is going to be taxed $3,000 for that. He is going to pay that out of his fee, and the rest out of his pocket. [79]

And as far as that argument of Mr. Sumner is concerned, that there is that lingering threat in connection with that, to my mind it is so futile that I didn't take the time to answer. Mr. Sumner sees fit to indicate that that is one of the matters that he has in the back of his mind. I will tell him this, I will congratulate him, it is the first time in treating this problem with at least ten of his predecessors that the point has ever been raised. It is the first time it has ever been considered before the referees, or at least presented to them, that the trustee is operating a business and in effect pays an operational tax or Mr. Sumner may sue him for such a tax, which will in many cases exceed his statutory fee.

The Court: Do you want to file a brief, Mr. Sumner?

Mr. Sumner: I would like to, your Honor. I believe the question is important enough, because, as I say, more than thirty of these orders are concerned. There were a few that slipped by me that I didn't have a chance to include, they were issued in about ten days, and I imagine there will be hundreds. It might be to everybody's advantage to fully brief it at this stage of the game. If I could have two weeks or so. I have a petition for certiorari in the

Supreme Court that should be filed. If I could have a month, I would appreciate it.

The Court: What would be the effect of any lengthy [80] delay in this matter?

Mr. Laugharn: It would be quite embarrassing to the third floor. It will hold up many bankrupt estates. This has been a log jam that we held up on until we had Judge Weinberger's decision.

I don't want to stop Mr. Sumner from doing what he thinks is his duty to his client, but I don't believe that there are any other cases, or any other theories that haven't been discussed here. These same matters came up before Judge McCormick. It was his own suggestion to put in his order the protection for the trustee. Mr. Tobin handled this Davis Standard Bread case and during the recess he went out and got this decision, because he said he remembered the language by Judge Harrison when this point was dicussed. If the court cares for that citation, it is 46 Fed. Supp. 841, a comparatively recent case. That is the matter that went up on to the Ninth Circuit, and there is language there that is entitled to consideration, particularly when he says:

> "Certainly the Bankruptcy Courts do not have to seek permission from the State of California in order to function in this State,"

and so forth.

The Court: He is thinking along my line, except he expresses it a little more vigorously.

Mr. Sumner, I will give you until Friday, the 29th of this [81] month, that is Friday of this week, to file any additional authorities or any additional

points that you want to file. You don't have to copy at length from cases, and if you have any additional theories, you can set them forth in a sketchy style.

Mr. Sumner: I appreciate that.

The Court: But I will give you a few days to see what you want to file, if you do. If you do file something, and if you want to answer it——

Mr. Laugharn: If the court please, I can phone the court's clerk the same day that I get the brief whether or not I will file it, and if I do file a reply, if I can have two days to do it, I will get it in.

Mr. Sumner: Will the court also make its order staying this until it makes its decision?

Mr. Laugharn: That is not the statutory way to approach a review, if you are approaching it.

Mr. Sumner: I am not approaching it from a review point, but staying the period which is running under the orders we are trying to set aside.

Mr. Laugharn: We will stipulate, if the court please, that 20 days be given to the State Board of Equalization to so file its claim with the referee in these respective estates from the date the court signs an order. I know the referees want to have it on that basis. [82]

The Court: From the date I file a formal order?

Mr. Laugharn: Yes.

The Court: Not from the time I make a decision, but from the date I make a formal order?

Mr. Sumner: That is, assuming, of course, that my motion is denied.

The Court: Yes. Thank you. [83]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 6th day of October, A.D. 1950.

/s/ SAMUEL GOLDSTEIN,
Official Reporter.

[Endorsed]: Filed March 20, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing six pages are the original Notice of Appeal and Designation of Record on Appeal in the above-entitled causes which, together with the record before this court and transmitted to the United States Court of Appeals for the Ninth Circuit in support of Petition for Writ of Prohibition or Other Appropriate Writ

in People of the State of California vs. United States District Court for the Southern District of California, Central Division et al., and numbered 12740 in said court constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 11th day of December, A.D. 1950.

[Seal] EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12760. United States Court of Appeals for the Ninth Circuit. California State Board of Equalization, Appellant, vs. Paul W. Sampsell, Trustee in Bankruptcy of the Estates of Twenty-Nine Palms Air Academy, et al., Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed March 22, 1951.

PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

At a Stated Term, to wit: The October Term 1950, of the United States Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Friday the fifteenth day of December in the year of our Lord one thousand nine hundred and fifty.

Present: Honorable Albert Lee Stephens, Circuit Judge, Presiding,

Honorable William Healy, Circuit Judge,

Honorable Homer T. Bone, Circuit Judge.

No. 12760

In the Matter of the Petition of

CALIFORNIA STATE BOARD OR EQUALIZATION for Allowance of Appeal Under Section 25(a) of the Bankruptcy Act

ORDER ALLOWING APPEAL

Upon consideration of the petition of California State Board of Equalization for allowance of an appeal under section 24(a) of the Bankruptcy Act, and good cause therefor appearing,

It Is Ordered that an appeal be allowed to California State Board of Equalization from the orders of the United States District Court for the Southern District of California entered Nov. 2, 1950, denying motion to vacate, set aside and dismiss certain orders made by Referees in Bankruptcy entitled Order

and Order to Show cause re claim for Sales Tax in the following bankruptcy estate matters:

Twenty-Nine Palms Air Academy
Shanahan Bros. Inc.
Jack Dean
North American Skyline
Irene V. Burke
Hamill Jones Corporation
Radiaphone Corporation
George B. McCabe
Ed Salvatierra
Curtis and Miriam Straub, etc.
Juvenile Products of Pasadena
Great Western Biscuit Co.
David Shapiro
Mical, Inc.
Phil Domecus
E. W. E. Mill & Lumber Co.
Eagle Air Freight
Sarah Payton
Norman D. Kessler, etc.
Raymond Charles Woernel
City Transfer & Storage Co.
Fashion Bootery, etc.
Perry B. Staver
Arcadia Furniture & Mfg. Co.
Kathryn Theroff
Model Packing Co. of Calif.
Thomascolor Incorporated
Vermont Market, etc.
Irving A. Peskin

Joseph F. Shovlin.
OK [Initialed] S, W.H., and B.

In the United States Court of Appeals
for the Ninth Circuit

No. 12760

CALIFORNIA STATE BOARD OF EQUALIZATION,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estates of TWENTY-NINE PALMS AIR ACADEMY, et al., Bankrupts,

Appellee.

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY

Appellant, California State Board of Equalization, intends to rely on appeal on the following points:

1. The proceedings below amounted to suits against the State of California without its consent, in violation of the constitutional principle barring such suits, and even without colorable compliance with Rules 3 and 4 of the Federal Rules of Civil Procedure.

2. The Referees in Bankruptcy do not have juris-

diction to enjoin a state taxing agency from enforcement of a valid state taxing statute where a plain, speedy and efficient remedy may be had in the courts of such state, nor do Federal District Courts as a whole have jurisdiction to so enjoin a state taxing agency.

3. Appellee made no showing whatsoever below of actual or threatened injury to any of the above-entitled estates or of any actual or threatened improper action on part of appellant to justify the issuance of thirty (30) injunctions against appellant.

4. Neither appellant nor Mr. Sampsell in his individual capacity was a party to any of the bankruptcy proceedings below involving the above-entitled bankrupt estates.

5. Neither the Referees in Bankruptcy nor the District Court below had jurisdiction to make any determination regarding Mr. Sampsell's individual tax liability to appellant.

6. The Bankruptcy Act does not contemplate nor authorize the filing of verified proofs of claim for administrative expense items.

7. The Referees and the District Judge below failed to give any consideration to the fact, as evidenced by the thirty (30) above-entitled bankruptcy proceedings, that Mr. Sampsell was regularly engaged in the business of acting as trustee in bankruptcy of numerous bankrupt estates and in the course of that activity regularly engaged in the

business of selling tangible personal property at retail in the State of California.

Dated March 30, 1951.

EDMUND G. BROWN,
Attorney General,

JAMES E. SABINE,
Deputy Attorney General,

/s/ EDWARD SUMNER,
Deputy Attorney General,
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 2, 1951.

[Title of Court of Appeals and Causes.]

APPELLANT'S DESIGNATION OF RECORD TO BE PRINTED

Appellant, California State Board of Equalization, hereby designates the entire record and all of the proceedings, including Reporter's Transcript, certified to the Clerk by the Clerk of the District Court in connection with the within appeal as material to the consideration of the appeal, and appellant hereby requests that the entire record and all the proceedings be printed.

Dated March 30, 1951.

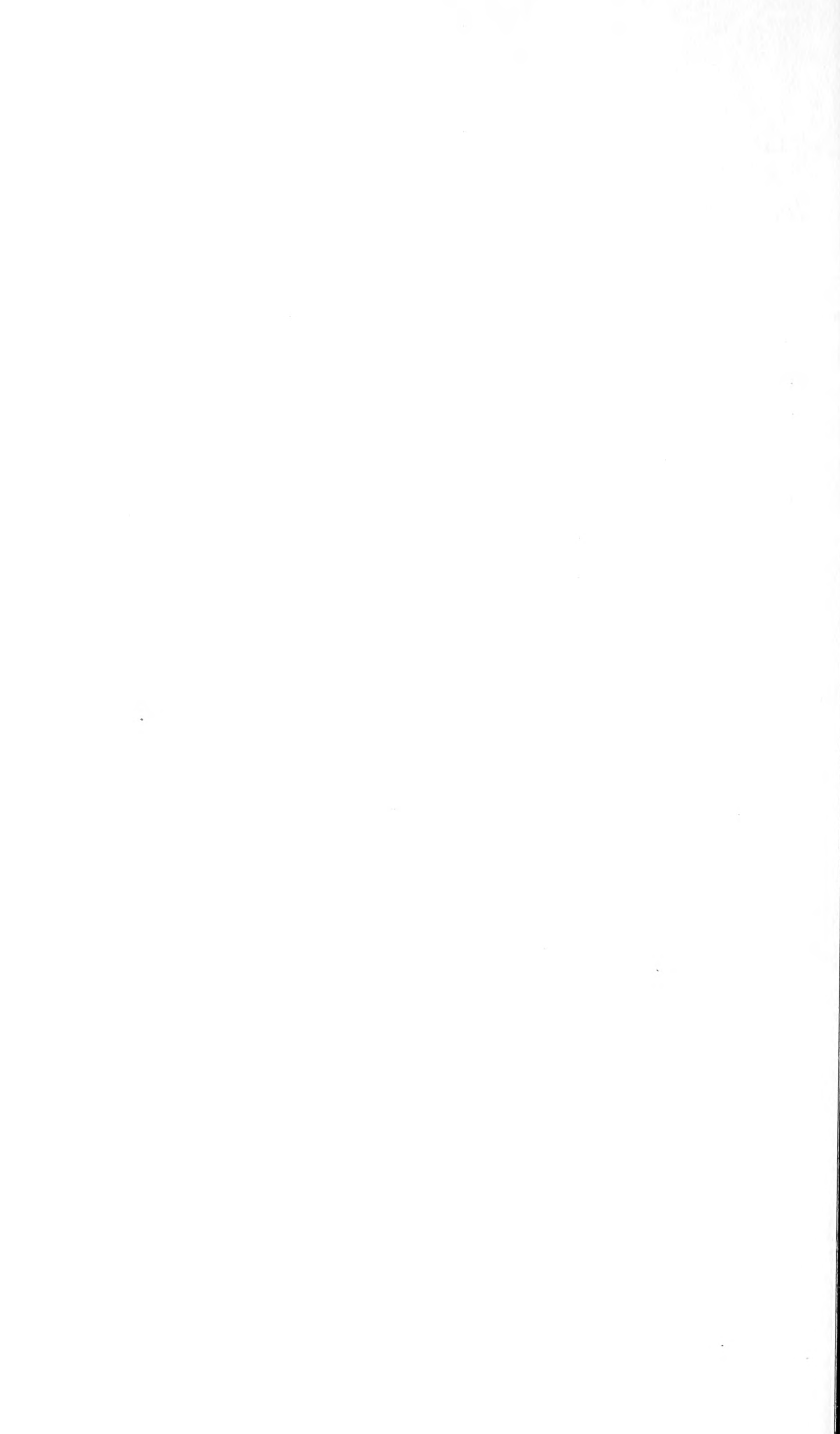
EDMUND G. BROWN,
Attorney General,

JAMES E. SABINE,
Deputy Attorney General,

/s/ EDWARD SUMNER,
Deputy Attorney General, Attorneys for Appellant California State Board of Equalization.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 2, 1951.



No. 12760

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

California State Board of Equalization,

Appellant,

vs.

Paul W. Sampsell, Trustee in Bankruptcy of the Estate of Twenty-Nine Palms Air Academy, *et al.,*

Appellee.

APPELLANT'S OPENING BRIEF.

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PAUL P. O'BRIEN
CLERK

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No. 12760

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Paul W. Sampsell, Trustee in Bankruptcy of the Estate of Twenty-Nine Palms Air Academy, *et al.,*

Appellee.

APPELLANT'S OPENING BRIEF.

I.

Preliminary Jurisdictional Statement.

The within appeal is taken pursuant to Order of this Court [Tr. 106-108] upon appellant's petition under Section 24(a) of the Bankruptcy Act, 11 U. S. C., Section 47(a), for the allowance of an appeal from an Order [Tr. 23-29] of the United States District Court for the Southern District of California, Central Division, entered on November 2, 1950, denying appellant's motions [Tr. 3-14, 20-23] to set aside, vacate and dismiss certain Orders entered by the four Referees in Bankruptcy in this jurisdiction in thirty bankruptcy proceedings.

II.

Statement of the Case.

During the period commencing on or about August 8, 1950, to on or about August 17, 1950, appellant received through the mail thirty documents entitled "ORDER AND ORDER TO SHOW CAUSE RE CLAIM FOR SALES TAX." Each of said "orders" was identical in form [Tr. 10-12] and each "order" was accompanied by a document entitled "PETITION FOR ORDER TO SHOW CAUSE AND FOR BAR ORDER, AND FOR HEARING OF TRUSTEE'S OBJECTIONS TO CLAIM." [Tr. 7-10.] These petitions and so-called "orders" were captioned, respectively, in thirty pending bankruptcy proceedings. [Tr. 23-25.]

The "ORDER AND ORDER TO SHOW CAUSE RE CLAIM FOR SALES TAX," in each instance, (a) purported to require appellant to file a "verified claim" in each of the aforesaid thirty bankruptcy proceedings for any liabilities which might exist for "sales tax because of any sale made by [Mr. Sampsell] the trustee or receiver in the administration" of each of the aforesaid thirty bankruptcy matters, and (b) purported to enjoin appellant from otherwise thereafter taking any proceedings to enforce collection of such liabilities. The "orders" purported to enjoin appellant from proceeding against Mr. Sampsell, the trustee in each of the bankruptcy proceedings, not only in his capacity as trustee but in his individual capacity as well. Inasmuch as Mr. Sampsell in his individual capacity and appellant were not parties to any of the aforesaid thirty bankruptcy proceedings, appellant moved

before the appropriate Referee in each instance to vacate and dismiss each of the thirty aforesaid "orders." The motions were segregated into four groups according to the Referee having jurisdiction, and each Referee, after the motions were argued (no evidence or testimony of any kind being offered or introduced), denied the motions. The "order" denying the motions in each instance read substantially as the "order" set forth on pages 12-14 of the transcript.

Upon the unanimous refusal of the four Referees in this jurisdiction to vacate and set aside the aforesaid "orders," appellant obtained an Order [Tr. 15-16] consolidating twenty-six of the bankruptcy proceedings for the express purpose of making a single motion before a District Judge to vacate and set aside twenty-six of the aforesaid thirty "orders." Thereafter, an additional Order of Consolidation was obtained [Tr. 18-19] consolidating the remaining four proceedings. It was stipulated by counsel for appellee at the hearing before the District Judge that the motion to vacate and dismiss the "orders" entered in these four additional proceedings [Tr. 20-23] might be heard simultaneously with the motion involving the twenty-six orders which was duly noticed for hearing pursuant to an "Order Shortening Time." [Tr. 17-18.]

No evidence or testimony of any kind was offered or introduced at the hearing had before the District Judge in opposition to appellant's motions to vacate and dismiss,

and after the matter was argued the District Judge made his Order [Tr. 23-29] denying appellant's motions.

The Order of the District Judge was entered on November 2, 1950. [Tr. 29.] A Notice of Appeal was filed by appellant on November 30, 1950 [Tr. 30] concurrently with Petitions to this Court for a writ of prohibition (No. 12740) and for Leave to Appeal. The latter petition was allowed by Order of this Court on December 15, 1950. [Tr. 105-108.] The petition for a writ of prohibition was denied by this Court without opinion.

III.

Specification of Errors.

1. The District Court erred in refusing to hold that the Referees in Bankruptcy did not have jurisdiction to enjoin appellant, a State taxing agency, from enforcing a valid State Taxing statute affording a plain, speedy and efficient remedy in the courts of the State.

2. The District Court erred in refusing to hold that Federal District Courts as a whole do not have jurisdiction to enjoin a State taxing agency from enforcing a valid State taxing statute where a plain, speedy and efficient remedy may be had in the courts of such State.

3. The District Court erred in refusing to hold that neither the Bankruptcy Referee, in each instance, nor the District Judge had jurisdiction of either appellant or Mr. Sampsell in his individual capacity.

4. The District Court erred in failing to recognize that the proceedings before the Referees amounted in effect to suits against the State of California without its consent, in violation of the constitutional principle barring such suits, and without even colorable compliance with Rules 3 and 4 of the Federal Rules of Civil Procedure.

5. The District Court erred in refusing to give recognition to the well-established principle that injunctive relief should be granted only upon a showing of actual or threatened irreparable injury.

6. The District Court erred in failing to give recognition to the provisions of the Bankruptcy Act which require the filing of proofs of claim only with respect to debts due from a bankrupt and not with respect to items of administrative expense.

7. The District Court erred in failing to hold that it had no jurisdiction to determine any controversy which might exist between Mr. Sampsell in his individual capacity and appellant.

8. The District Court erred in failing to give due consideration to the fact that Mr. Sampsell has regularly been engaged in the business of acting as trustee in bankruptcy of numerous bankrupt estates.

ARGUMENT.

A.

It Is Elementary That a State Cannot Be Sued Without Its Consent.

The well established proposition that a state cannot be sued without its consent does not appear to require extended discussion. The applicability of this principle to the factual situation involved herein is clear. Obviously, the referees below were purporting to assert jurisdiction to determine what is in effect a series of actions brought by Mr. Sampsell against appellant to enjoin the collection of taxes which might be due under the California Sales and Use Tax Law.

Section 6931 of the California Sales and Use Tax Law, California Revenue and Taxation Code, Division 2, Part 1, reads as follows:

> "No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action, or proceeding in any court against this State or against any officer of the State to prevent or enjoin the collection under this part of any tax or any amount of tax required to be collected."

See, also, Willoughby on the Constitution of the United States, Volume 3, 2nd Edition (1929), commencing at page 384, and at 1396; 49 Am. Jur. commencing at pages 301 and 304.

B.

Appellant and Mr. Sampsell, in His Individual Capacity Were Not Parties to Any of the Instant Thirty Bankruptcy Proceedings.

It is well established that bankruptcy proceedings are proceedings *in rem* (1 Remington on Bankruptcy, 40 *et seq.*) and that upon the commencement of a bankruptcy proceeding by the filing of a petition in bankruptcy the bankruptcy court obtains jurisdiction only of the bankrupt, the bankrupt's estate, and creditors of the bankrupt.

Obviously, Mr. Sampsell in his individual capacity, and any controversy he might have with appellant, are not within the jurisdiction of the Bankruptcy Court. Obviously, appellant, insofar as it might assert any liability against Mr. Sampsell in his individual capacity, is not within the jurisdiction of the Bankruptcy Court. Equally obvious is the fact that appellant, even insofar as it might assert a liability under the California Sales and Use Tax Law against Mr. Sampsell in his capacity as trustee, is not a creditor of the bankrupt.

Reference to the petition filed by Mr. Sampsell in each of the aforesaid thirty bankruptcy proceedings [Tr. 7-10] will affirmatively establish that the "orders" issued by the Referees purported to deal entirely with matters arising subsequent to the commencement of bankruptcy proceedings, and additionally, with possible tax liabilities incurred by Mr. Sampsell in his individual capacity.

C.

The "Orders" Issued by the Referees in Effect Amount to Judgments Against Appellant Rendered in Proceedings to Which Appellant Was Not a Party.

Inasmuch as appellant was not automatically made a a party to the aforesaid thirty bankruptcy proceedings upon their commencement, such proceedings being *in rem, supra,* it is apparent that the "orders" amount to judgments against appellant which could not have been obtained by Mr. Sampsell from a District Judge upon the filing of a complaint and the issuance and service of summons in compliance with the Federal Rules of Civil Procedure.

The basis for this statement is the following:

1. A state may not be sued without its consent, *supra.*

2. Section 6931 of the California Sales and Use Tax Law specifically provides that no injunction shall issue in *any suit,* action or proceeding to prevent or enjoin the collection of taxes under the California Sales and Use Tax Law.

3. Congress has specifically removed from the jurisdiction of Federal District Courts the power to enjoin the collection of state taxes under a valid state taxing statute where an adequate remedy exists under state law.

United States Code, Sec. 1341, Revised Title 28;

Alabama Public Service Commission, et al. v. Southern Ry. Co., 341 U. S. ...., 71 S. Ct. 762, 95 L. Ed. (Adv. Ops.) 721.

4. The California Sales and Use Tax Law provides for administrative and judicial review, and the adequacy of the remedies provided has been judicially established by decisions of the Federal Courts in *Nevada-California Electric Corp. v. Corbett,* 22 Fed. Supp. 951, and *Corbett v. Printers and Publishers Corp., Ltd.,* 127 F. 2d 195.

5. Reference to Sections 2281 and 2284 of Revised Title 28, United States Code, makes it clear that even if an injunction is sought against a state officer to restrain the enforcement of a statute alleged to be unconstitutional, application for such injunctive relief must be directed to the three-judge court provided for by Section 2284.

6. If Mr. Sampsell, in each of the thirty instances involved herein, had attempted to bring appellant within the jurisdiction of the Federal District Court by the filing of a complaint and personal service of summons in compliance with Rules 3 and 4 of the Federal Rules of Civil Procedure, he would have been required by Rule 8 of the Federal Rules of Civil Procedure to set forth in his complaint a short, plain statement of the grounds upon which the District Court's jurisdiction might rest. The petitions filed by Mr. Sampsell upon which the thirty "orders" involved herein were issued do not contain such a statement.

D.

The Bankruptcy Act Does Not Require the Filing of Proofs of Claim for Administrative Expense Items.

The Bankruptcy Act requires the filing of proofs of claim with respect to debts due and owing from a bankrupt prior to the commencement of bankruptcy proceedings. It is well established that liabilities incurred by a trustee in the course of his administration of a bankrupt estate are not properly the subject of proofs of claim.

> 11 United States Code, Sec. 102, Bankruptcy Act, Sec. 62;
>
> 2 Remington on Bankruptcy 150, *et seq.*

The referees, appellee and his counsel, and the judge below have not directed appellant's attention to any provision or decision requiring the filing of proofs of claim for administrative expense items. Appellant has been unable to discover such a provision or decision.

E.

Bankruptcy Courts Do Not Have Jurisdiction to Stay Proceedings Against a Trustee in Bankruptcy in His Individual Capacity.

> *In re Roberts,* 169 Fed. 1022;
>
> *In re Kalb & Berg Mfg. Co.,* 165 Fed. 895;
>
> *Voss v. Conron Bros. Co.,* 59 F. 2d 969.

We are not aware of any authority, either statutory or judicial, to support the proposition that a trustee in bankruptcy may seek judicial review in the Federal Bankruptcy Court of state tax assessments levied against him in his individual capacity merely because the assessments

relate to the trustee's activities in connection with the administration of bankruptcy estates. Not a single case was cited by appellee or the United States Attorney who represented the District Court in the prohibition proceedings referred to above to support such a proposition.

F.

The Petitions Upon Which the "Orders" Were Issued by the Referees Below Set Forth No Grounds Justifying the Issuance of an Equitable Writ.

Assuming, *arguendo,* that Mr. Sampsell, in his individual capacity as well as in his capacity as trustee, could properly have petitioned the Bankruptcy Court for the issuance of a restraining order directed to appellant to enjoin the enforcement of the California Sales and Use Tax Law, and assuming, *arguendo,* that the order could have issued despite the provisions of Section 6931 of the California Sales and Use Tax Law, it is elementary that Mr. Sampsell should have been required to make an adequate showing of actual or threatened irreparable injury.

As reference to the record will disclose, not only did appellee's petitions fail to allege actual or threatened injury but, additionally, no showing to that effect was made in opposition to appellant's motions to dismiss. No attempt was made to demonstrate, in Mr. Sampsell's behalf, that the administrative and judicial review provisions of the State statute did not provide an adequate remedy in this instance. No recognition was afforded the decisions of the Federal Courts in the *Nevada-California Electric Corp.*, and *Printers & Publishers Corp.* cases, *supra.*

G.

The True Nature of Mr. Sampsell's Activities Were Not Considered by the Court Below.

This Court's attention is additionally directed to the fact that the District Court should have taken judicial notice of the fact that Mr. Sampsell was regularly engaged in acting as trustee and/or receiver in numerous bankruptcy proceedings (as is evidenced by the fact that he is the trustee in each of the thirty bankruptcy proceedings involved herein), and as such, regularly engaged in making sales of tangible personal property included in the assets of bankrupt estates; and the court below should have considered the tax implications flowing therefrom under the California Sales and Use Tax Law by virtue of the provisions of Sections 959 and 960 of Revised Title 28, United States Code.

It is appellant's contention that appellee, by virtue of his regularly engaging in the business of acting as trustee in bankruptcy under authority of the court below in numerous bankruptcy estates, was clearly subject to the provisions of the California taxing statute, pursuant to Sections 959 and 960, Title 28, United States Code, even if it were to be assumed, *arguendo,* that some doubt on this point otherwise existed.

Conclusion.

The presentation of the within appeal has presented many difficulties to counsel for appellant inasmuch as the "orders" of the referee and Order of the District Judge were entered with complete disregard for what appellant's counsel submits are fundamental, well-established, elementary principles. Counsel for appellant feel some-

what handicapped in presenting this appeal by the failure of appellee, the referees in bankruptcy, the District Judge, the United States Attorney and other counsel who participated in the proceedings below and who opposed the application for a writ of prohibition in *People of the State of California v. United States District Court, etc.*, No. 12740, and, indeed, this Court (in denying the application for a writ of prohibition without opinion), to cite pertinent statutory or judicial authority to support the propriety of the issuance of the "orders" involved herein. In view of the foregoing, we have not attempted to cite the numerous authorities supporting the fundamental principles referred to above but stand ready to do so should the Court desire it to be done.

As was indicated to this Court when counsel for appellant appeared as counsel for the State of California in No. 12740, failure to promptly judicially establish the invalidity of these "orders" would encourage the issuance of additional "orders," perhaps even broader in scope. That prediction has unfortunately come true. To date "orders" similar to those involved herein have been issued in approximately one hundred cases, some of which purport to restrain not merely the appellant, but also the Department of Employment, the District Attorney of Los Angeles County and the City Attorney of the City of Los Angeles, from enforcing the provisions of valid state taxing statutes.

It is respectfully submitted that the invalidity of the "orders" involved herein should be judicially established

by this Court for the reasons set forth above, to enable appellant as well as other State taxing agencies, and the various individuals who act as trustees in bankruptcy in this jurisdiction, to proceed amicably, with due respect for the sovereignty of the State of California and the jurisdiction of the Bankruptcy Court, to determine in an appropriate manner any and all tax controversies which might arise in connection with the administration of bankruptcy estates.

Respectfully submitted,

Edmund G. Brown,
Attorney General,

James E. Sabine,
Deputy Attorney General,

Edward Sumner,
Deputy Attorney General,

Attorneys for Appellant.

No. 12,760

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

California State Board of Equalization,

Appellant,

vs.

Paul W. Sampsell, Trustee in Bankruptcy of the Estate of Twenty-nine Palms Air Academy, *et al.*,

Appellee.

APPELLEE'S BRIEF.

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DEC 22 1951
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Appellee.

APPELLEE'S BRIEF.

"If at first you don't succeed, try, try again." The writer of this Brief does not recall the author of this little aphorism, but in looking over the brief of the appellant, we cannot refrain from applying it to the case at Bar.

For many years the State Board of Equalization of California has been casting covetous eyes on property being liquidated in the Bankruptcy Courts under and by virtue of the Bankruptcy Acts enacted under the provisions of Article I, Section 8 of the Constitution of the United States. Repeatedly it has sought by one method or another, by filing claims, by threatening to subject Trustees to individual liability after their discharge, and appeals from the Courts of Bankruptcy in which the various estates were being administered and liquidated,

to impose the California State sales tax on the proceeds of liquidation sales.

In the case of the *State of California v. Moore, as Trustee for Paul Kent Truck Co.,* the State of California attempted without success to impose a tax penalty on William H. Moore, Jr. for gasoline tax on trucks claimed to have been sold by him in the bankruptcy liquidation of the Paul Kent Truck Co., and was rebuffed by this Court. (See *State of California v. Moore,* 88 F. 2d 564.) It next attempted to impose a sales tax on L. Boteler, as Trustee of the Estate of Davis Standard Bread Company, and after being enjoined by the District Court (*Matter of Davis Standard Bread Co.,* 46 Fed. Supp. 841), unsuccessfully appealed to this Court and was again rebuffed in its efforts. (*State Board of Equalization v. Boteler,* 131 F. 2d 386.) It then began warning trustees, who are statutory officers of the Court (Bankruptcy Act, Sec. 33), and receivers appointed by the United States District Court (Bankruptcy Act, Sec. 2-a, subd. 3), that unless they paid sales tax for carrying out their statutory duties (Bankruptcy Act, Sec. 47-a-1) they, officers of this Court, would be held personally liable after their discharge for unpaid sales taxes which the Board contended it had the power to levy and collect on liquidation sales for the *privilege* of carrying on the business of acting as statutory officers of the Federal Court under the provisions of the Bankruptcy Act.

Realizing that the failure of trustees to pay the taxes demanded was not a tortious liability, for which the trustees would be liable outside of their bonds, but would constitute a monetary liability for which their statutory bonds might be liable while in office (Bankruptcy Act, Sec. 50-b), and that after the distribution of the assets of the bank-

rupt estate to creditors, they would be placed at the mercy of the State Courts, involving a State tax for which they might be held personally liable, the Referees in Bankruptcy made orders requiring the State Board of Equalization, if it claimed any sales tax from the trustees in bankruptcy, arising from liquidation sales in bankruptcy, for what it deemed the privilege of fulfilling their office, to make its demands in the Bankruptcy Court while the estate was yet intact; and to have this taxing agency establish its expense of administration claim within a reasonable time or forever hold its peace. This did not constitute a suit against the State of California, as has been repeatedly asserted by the State Board of Equalization. (See *California State Board of Equalization v. Goggin,* 191 F. 2d 726, at page 728.)

While the case of *California State Board of Equalization v. Goggin* was pending, the State Board of Equalization filed a motion to set aside, vacate and dismiss the orders of the Referees so made in various pending bankruptcy proceedings.

As can be seen from an examination of the record, this motion involved numerous cases. They were all consolidated for hearing before Judge James M. Carter in the United States District Court for the Southern District of California. The State Board of Equalization appeared by the Attorney General's office, and the appellee here appeared by Hubert F. Laugharn. There was no dispute on the facts [R. p. 37], hence the record shows nothing but an oral argument on the right of the State to levy a sales tax on judicial sales in the Bankruptcy Court, and of the right of the Bankruptcy Court to protect its officers, either while the office or after their discharge, in connection with their official acts, or, as the

State Board of Equalization contends, an official omission while in office. Notwithstanding the fact that the appellant here was the moving party, it apparently offered no evidence as it now complains. (Appellant's Br. p. 3.) By tacit consent, the motion was argued as a pure question of law [R. p. 37] and was denied by Judge Carter. [R. p. 28.]

The appellant then applied to this Court for a writ of prohibition against Judge Carter and Judge McCormick of the United States District Court. (Appellant's Br. p. 4.) After argument here the writ of prohibition was denied without opinion.

Thereafter, on August 21, 1951, this Court handed down another opinion in *California State Board of Equalization v. Goggin,* 191 Fed. 726, affirming a restraining order entered by Judge Jacob Weinberger in the *West Coast Cabinet & Fixture Co.,* restraining the efforts of the State Board of Equalization to collect sales tax on some cabinets sold by the Trustee. The Opinion of the Court in that case followed *State Board of Equalization v. Boteler,* and the judgment of the District Court was affirmed. In a separate concurring Opinion filed by United States District Judge James Alger Fee, sitting on the Court at the time *California State Board of Equalization v. Goggin* was heard, Judge Fee vigorously condemned the practice of this State taxing agency to attempt to burden liquidation required under a federal law with a state tax. Judge Fee said:

> "A tax on this transaction, whatever form it takes, is a tax on the process of the Court liquidating assets in accordance with constitutional power. In

another aspect it may be considered as a license fee required of a federal officer to make liquidation. In either event it is void."

In arguing *State Board of Equalization v. Goggin* before this Court the writer of this brief concluded his oral argument with the statement that if the State of California could impose a tax or license fee on a trustee in bankruptcy, a statutory officer appointed by the United States District Court, to perform certain mandatory duties, then the State can likewise require the United States Marshal to take out a license to conduct each execution sale or a sale under a decree in admiralty on the ground that the United States Marshal was in the business of selling property of delinquent debtors under execution, or merchandise condemned for one reason or another by the Federal Courts. Judge Fee's special concurring opinion in the case of *Goggin v. State Board of Equalization* would seem to pursue very much the same line of reasoning.

Notwithstanding the setback received at the hands of this Court, the State Board of Equalization now has taken this appeal from Judge Carter's order affirming those of the Referees.

Citing no applicable authorities, the appellant, in its Opening Brief, resorts to sarcasm, which we believe ill-befits the high office of Attorney General of a sovereign state. The orders entered by the Referees and on review by the District Judge were orders entered under an express grant of jurisdiction under Section 2-a, subdivision

15, authorizing courts of bankruptcy to "make such orders, issue such process, and enter such judgments in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act; * * *."

Notwithstanding the fact that these orders were duly and legally entered in pending proceedings and given the stamp of approval by the District Court, throughout the entire brief filed on this appeal, appellant does not deign to dignify these orders as being such. Every reference, so far as we have been able to ascertain from a careful examination of appellant's brief, refers to the results of these judicial proceedings as "orders." The quotation marks are as eloquent as if counsel for the appellant had resorted to the appellation of "alleged" orders or "so-called" orders in referring to the orders of the Referee and the District Judge. Frankly, we believe such contemptuous language to be as overzealous as it would be if a private attorney appealed from a judgment based on the verdict of a jury in the United States District Court, after a contested trial, and referred to it as a "judgment" based on a "verdict" of a "jury."

Here there is involved only a serious question of law which has been repeatedly determined by this Court against the appellant, and we don't believe that the sneering reference to the lower court's "orders" will lend any assistance to this Court in again determining that the State Board of Equalization of California is wrong.

Has the Court an Inherent Right to Protect Its Own Officers in Carrying Out Their Mandatory Duties After They Are Discharged and the Estate Distributed Beyond Redemption?

It is clear that the trustees, acting as officers of the Court, were facing a clear and immediate danger. They were between two fires. Section 47-a of the Bankruptcy Act required them to convert into cash the property of the estates for which they were trustees under the direction of the Court, and to close up the estates as expeditiously as is compatible with the best interests of the parties in interest, and to disburse the money only by check or draft on such depositories, and to examine all proofs of claim and object to the allowance of claims that may be improper, and to pay dividends within ten days after they are declared by Referees, and make reports both interlocutory and final to the courts during the course of the administration. In carrying out the duty to object to claims or demands made against a bankrupt estate, it is patently necessary that the Trustee know the amount and nature of such claims or demands. It is also necessary for the Trustee to bring before the Referee for approval the various expenses of administration for approval or disapproval. (*Matter of California Pea Products Inc.*, 37 Fed. Supp. 638.) Such was the nature of the sales tax claimed here. The State Board of Equalization reserved unto itself the right to withhold such alleged expense of administration obligations, and if the Trustee did not seek them out and pay them, to hold him personally liable after he was discharged, after his office had ceased to exist, and after he was out from under the protection of the Court which appointed him and directed him in his duties.

In other words, he would close any estate for which he had been Trustee and in which all assets had been sold and distributed under the mandate of Section 47-a of the National Bankruptcy Act, at his peril of having a demand made upon him for payment of a sales tax, on assets sold by him as an officer of the Court, which tenure of office was now terminated, and of being compelled to go out and at his own expense employ private attorneys, pay filing fees for an answer in the State Court, and if he desired a jury trial on the demands of the State Board of Equalization, post one day's jury fees and mileage to exercise his constitutional right to a trial by jury.

Considering the modest fees allowed to a Trustee under Section 48-a of the National Bankruptcy Act, it is very evident that no person could be found, who would undertake the onerous and complex duties imposed upon trustees in bankruptcy under Section 47 of the Naitonal Bankruptcy Act, at his personal peril of having to defend against suits and possibly personal judgments against him individually, imposed by the courts of the State of California for merely carrying out the mandatory duties imposed upon him by the Federal Court. If the estate were a large one involving several hundred thousands of dollars, the sales tax demanded would be correspondingly large and the Trustee's compensation would diminish to a maximum of 1% of all sums realized from liquidation sales over a total of $10,000.00. (Bankruptcy Act. Sec. 48-c, subd. 1.) It being evident to any sensible man that no qualified person except an execution-proof ne'er-do-well would even consider accepting a trusteeship in bankruptcy in the face of such imminent danger, the lower court in the interests of efficient administration of bankrupt estates, and in the face of the threatening attitude

of a State Bureau to impose a penalty on trustees for conscientiously performing their mandatory duties, threw a mantle of protection over Mr. Sampsell, Mr. Goggin and others who had earned the trust and confidence of the courts by their past able administrations over a period of years. The Court reassured them that the court that appointed them would stand behind them after their discharge and would not permit any state bureau to impose a penalty on them for ministerial acts performed by them, after it had discharged them and exonerated their faithful performance bonds.

The Referees in bankruptcy and the District Judges by their orders leave no doubt as to whether or not the Trustee should have the protection of the Court. Certainly such protection is warranted not only under the provisions of Section 2-a, subdivision 15, but by repeated decisions of this Court, reassuring trustees that they would be protected after their discharge from vexatious and expensive suits brought by a disappointed state taxing agency against them individually. We respectfully submit that not only as a matter of discretion, but as a matter of right, if not as a mandatory duty, the District Court entered these orders protecting its trustees from danger after their discharge.

In referring to the contended sales taxes against the trustees, District Judge Paul J. McCormick, *In the Matter of California Pea Products, Inc.*, 37 Fed. Supp. 638, said:

> "The transactions upon which the state bases its contention in this review have all taken place after adjudication and the selection of the trustee in bankruptcy. The claims may therefore be considered as not strictly 'claims' against the estate within the contemplation of sections 57(n) and 64(a), but

rather an expense of administration provided for in section 62 of the Act. But the same power of adjudicating such 'claims' is vested in the bankruptcy court by section 62 as in the matter of tax claims under sections 57(n) and 64(a).

"The Supreme Court in *Kalb v. Feuerstein,* 308 U. S. 433, 41 Am. B. R. (N. S.) 501, speaking of the broad and plenary power of courts of bankruptcy said, 'The Constitution grants Congress exclusive power to regulate bankruptcy and under this power Congress can limit the jurisdiction which courts, state or federal, can exercise over the person or property of a debtor who duly invokes the bankruptcy law.' See, also, Arkansas Corporation Commission v. Thompson (C. C. A. 8th Cir.), 44 Am. B. R. (N. S.) 536, 116 F. (2d) 179.

* * * * * *

"We conclude by holding that the findings, injunction and order of the referee, dated March 22, 1940, are modified as follows: The State Board of Equalization of the state of California, its officers, agents, employees and attorneys are, and each of them is, enjoined and restrained from in any manner enforcing or attempting to enforce any claim, tax, assessment, collection, penalties or sanctions provided in or pursuant to Act 8493 of the General Laws of the state of California against the estate of *California Pea Products, Inc.,* a corporation, bankrupt, or against the trustee thereof, or against L. Boteler personally, or against any property of said bankrupt, or of L. Boteler, or from in any manner interfering with the administration of this estate, without prejudice, however, to the presentation and filing of any claim for taxes by the State Board of Equalization of the state of California, its accredited

and authorized officers, agents or attorneys, within the time allowed by law, and to having such claim considered by the referee and its legality and validity determined by him, or without prejudice to a 'bar order' of the referee."

This Court recognized the problem which confronted the Court (the Referee or the District Court) which had before it the administration of bankrupt estates, and on this same problem in *McColgan v. Maier Brewing Co.*, 134 F. 2d 385, Judge Healy, who wrote the opinion for the Court, said:

> "In June, 1932, an involuntary petition was filed against Maier Brewing Company and a receiver appointed with authority to manage and operate the business and property of the alleged bankrupt. The receiver and his successor, the latter being appointed in 1935, operated the business until September 10, 1938. Appellant, Franchise Tax Commissioner of the state of California, asserts that during this period franchise taxes based on net income were assessable under the state Bank and Corporation Franchise Tax Act, Stats. 1929, p. 19, as amended.
>
> "Each year, except in 1935, taxable net income was derived by the receivers from their operation of the brewery. Although the receivers paid federal taxes on this income they paid to the state only the minimum tax of $25.00, presumably in the belief that since the corporation itself was inactive, the franchise tax was not owing. * * *
>
> "The taxes accruing as a consequence of the operation of the business by the receivers were expenses of administration. They were not provable debts owing by the corporation itself; but were obligations of the receivership. In respect of the payment of administrative expenses, the statute (11 U. S. C. A., Sec.

> 102, sub. a) provides that unless other provisions for their payment are made they shall be 'reported in detail, under oath, and examined and approved or disapproved by the Court. If approved, they shall be paid or allowed out of the estates in which they were incurred.' No other provision was made for the payment of these expenses. Thus the liability of the estate was dependent upon their being reported and their payment directed by Court order. * * *
>
> "Of course if these taxes had been assessed and a claim made upon the receivers for their payment they would, like administrative expenses generally, have occupied a preferred status. *But the statute does not dispense with the necessity for making timely demand for their payment in the receivership proceeding.* As much now as in the past orderly procedure requires that *administrative expenses be settled while the property yet remains in the custody of the Court.*" (Italics ours.)

Not satisfied to abide by the plain, unequivocal decision of this Court in *State Board of Equalization v. Boteler,* 131 F. 2d 386, someone then induced the State Legislature to amend the Sales and Use Tax Act to include, in so many words, "Trustees in Bankruptcy," and the merry-go-round of litigation started all over again, winding up in this Court in *California State Board of Equalization v. Goggin,* 191 F. 2d 727.

The requirement of the State Board of Equalization that trustees take out licenses to perform their mandatory duties and to make special reports to the State Board of Equalization, where purely liquidation sales were involved, imposes additional burdens upon a trustee in bankruptcy in conflict with Federal law and is unconstitutional.

This question was argued in our brief in *State Board of Equalization v. Boteler,* No. 10,021 in this Court, 191 F. 2d 726. In that case we cited:

Holmes v. Rowe, 97 F. 2d 537;

In re Brinn, 262 Fed. 527;

Donnelly v. Southern Pacific Co., 18 Cal. 2d 863;

Moore v. Bay, 284 U. S. 4.

in response to the contention that the Trustee was not entitled to injunctive relief and that he had a plain, speedy and adequate remedy at law by suing to recover taxes paid, in the State Courts. We called attention of the Court to the right of the Federal Courts to enjoin enforcement of an unconstitutional State statute by State officers clothed with authority to enforce it where it violates the Federal statute, and cited:

Tyson & Brothers United Theatre Ticket Officers v. Banton, 273 U. S. 418;

Pennsylvania v. West Virginia, 262 U. S. 553;

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Wofford Oil Co. v. Smith, 263 Fed. 396;

Minneapolis Brewing Co. v. McGillivray, 104 Fed. 258.

Conclusion.

We respectfully submit that the order of the District Court in these cases should be affirmed, and affirmed in such a way and in such unequivocal language as to terminate the running battle that has been going on between the State Board of Equalization and other California taxing agencies continuously since 1941, when Judge McCormick handed down his original decision in the matter of *California Pea Products, Inc., Bankrupt,* 37 Fed. Supp. 638, and under cover of which, by one device or another, the State Board of Equalization has been endeavoring to intrude into and encroach upon the field of bankruptcy administration and liquidation, a field essentially federal. We believe that the decision in this case should follow the law as laid down in *State Board of Equalization v. Goggin,* 191 F. 2d 726, be as unequivocal as was the special concurring Opinion of District Judge Fee. The very caption of the case at bar indicates clearly the large number of bankrupt estates which are being held open by one Trustee alone because he dared not close them and endanger his own personal fortune in interminable litigation in the state courts. Mr. Sampsell is not the only Trustee who has been confronted by this dilemma. Mr. Goggin and Mr. Boteler have both been compelled to face the express or implied threat that unless they paid sales tax to the State of California on mandatory liquidation sales conducted in a Federal Court they would be held personally liable to the State of California for their alleged dereliction of duty. We do not know how many hundreds of thousands or possibly millions of dollars are lying idle in designated depositories of Bankruptcy Courts awaiting the final clarifying word from this Court to release them. If the Trustees involved release them in

dividends, as said before, they are facing the imminent danger of being personally sued for sales tax for the *privilege* of carrying on the business of being duly elected officers of the Bankruptcy Court under Section 33 of the National Bankruptcy Act.

The theory on which the appellant is now seeking to impede bankruptcy administration, unless paid their price, is that individuals who accept two or more trusteeships in bankruptcy a year are engaged in the business of being trustees in bankruptcy and are subject to state taxation under the California Sales and Use Tax Laws. We believe that such a contention is utterly ridiculous. Simply because there are men in the State of California who by reason of education, experience, qualifications and skill are entrusted by the courts in the Northern and Southern Districts of California with the administration of numerous complicated bankrupt estates, we do not believe that any state agency has a right constitutionally to invade the indisputably federal field of bankruptcy administration and declare by bureaucratic ukase that Federal Court officers are engaged in the "business of trustee in bankruptcy."

We respectfully submit that the order of Judge Carter affirming the Referee's bar orders in these cases, and each of them, should be affirmed.

Respectfully submitted this 18th day of December, 1951.

Frank C. Weller,
Hubert F. Laugharn,
Thomas S. Tobin,

Attorneys for Appellee.

No. 12885

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CONSOLIDATED VULTEE AIRCRAFT CORPORATION, a Delaware corporation, and AMERICAN AIRLINES, INC., a Delaware corporation,

Appellants,

vs.

MAURICE A. GARBELL, INC., a California corporation, and GARBELL RESEARCH FOUNDATION, a California corporation,

Appellees.

OPENING BRIEF OF APPELLANTS.

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No. 12885

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Consolidated Vultee Aircraft Corporation, a Delaware corporation, and American Airlines, Inc., a Delaware corporation,

Appellants,

vs.

Maurice A. Garbell, Inc., a California corporation, and Garbell Research Foundation, a California corporation,

Appellees.

OPENING BRIEF OF APPELLANTS.

I.

Statement of Jurisdiction.

Jurisdiction of the District Court in this action is founded upon the patent statutes of the United States [Complaint, R. 4], and this is admitted by the defendants [Answer, R. 6]. The District Court's judgment was entered on January 15, 1951 [R. 58], and appellants' notice of appeal was filed on February 12, 1951 [R. 134]. Jurisdiction of the District Court is therefore founded upon Title 28, Section 1338, of the United States Code, and jurisdiction of this Court of Appeals is founded upon Title 28, Section 1292(4) of the United States Code.

II.

Statement of the Case.

A. The Parties. Defendant-appellant Consolidated Vultee Aircraft Corporation (hereinafter referred to as "Consolidated") is a Delaware corporation, having its principal place of business at San Diego, California. It is, and for many years has been, engaged in the development, design, and manufacture of commercial and military aircraft.

Defendant-appellant American Airlines, Inc. (hereinafter referred to as "American") is a Delaware corporation, which for many years has been engaged in the commercial operation of aircraft for passenger and freight transportation.

Plaintiffs-appellees Maurice A. Garbell, Inc., and Garbell Research Foundation (hereinafter collectively referred to as "plaintiffs") are California corporations, being assignees by mesne assignments of Letters Patent No. 2,441,758 in suit. Maurice A. Garbell, patentee of the patent in suit and plaintiffs' sole witness, is the president of both plaintiffs.

B. The Issue. The Complaint charges infringement of claims 1, 2, 3, 5, 6, and 12 of U. S. Patent No. 2,441,-758, issued on May 18, 1948, to Maurice A. Garbell on "Fluid-Foil Lifting Surface," generally known as an aircraft wing. Consolidated is charged as a maker of the aircraft wing used on its Model 240 "Convair" airplane, and American is charged as a user of such aircraft, in infringement of the patent in suit.

The District Court held the Garbell patent No. 2,441,-758 in suit valid, and held that the wings of the Model 240 "Convair" airplanes sold by Consolidated and used

by American infringe the patent in suit [R. 58-59]. Consolidated has sold about 170 of such "Convair" airplanes, the selling price thereof ranging from $260,000.00 to $560,000.00 each. The judgment of the District Court, if sustained, has important and far-reaching effects and restraint upon the aviation industry.

The District Court enjoined further manufacture, use, and sale by defendants of such aircraft [R. 59-64], but upon the posting by defendants of a $50,000.00 bond, the issuance of the injunction was stayed pending appeal [R. 135-136]. A motion for a new trial brought by defendants [R. 65] was denied by the District Court.

C. Background of the Patent in Suit. Garbell, the patentee, was born in Moscow, Russia, in 1914 [R. 158]. His early personal background is set forth in detail in Plaintiffs' Exhibit 15 [R. 624-632]. In Italy, Garbell became interested in making and flying sailplanes (*i. e.*, "gliders"), and for several years up until 1938, he engaged in the design and flight of such sailplanes [R. 159-162], in 1937 taking part in building and publicly flying a sailplane known as the "Pinguino," which, he testified, embodied the "principles" of the alleged invention of the patent in suit [R. 239-241].

In 1939, Garbell came to the United States by slow boat, and, he asserts, it was during this boat trip that he conceived the alleged invention of the patent in suit [R. 164-165, 199]. Plaintiffs produced no corroboration of any kind of Garbell's story of such conception, and only his naked, oral testimony lends it any support.

From his arrival in the United States until August, 1942, Garbell was employed in various occupations, most of which related to aviation [R. 631]. During this period,

Garbell did nothing with regard to the alleged invention of the patent in suit. He testified that he disclosed the conception to a Harry Bradford Chin and to a Dr. Platt [R. 199-207], but neither was called as a witness by plaintiffs to corroborate Garbell's testimony. In fact, Platt had died and Chin by affidavit, produced on defendants' motion for a new trial, denied Garbell's assertions [R. 66].

In July, 1942, Garbell applied to Consolidated for a job as an aeronautical engineer, representing that he was "well versed in airplane and engine design, performance analysis and research," and stating: "I am primarily interested in being placed where my ability may find its greatest usefulness in your organization, namely preliminary design or research engineering" [R. 617-624]. In the negotiations for such employment, Garbell set forth at length his qualifications and his previous extensive and varied experience in aircraft design [R. 617-624]. If Garbell, prior to his employment by Consolidated, had actually conceived such alleged invention, he kept it to himself and made no claim or assertion with regard thereto to the defendant, although he was obviously attempting to impress Consolidated with his past accomplishments.

Garbell was hired by Consolidated on September 7, 1942, by a formal employment agreement [Pltfs. Ex. 15, R. 624], as an "Aeronautical Engineer" [R. 802], with duties which included designing, planning, and analysis of a wide field of aerodynamic subjects, including aircraft wings [R. 694-774]. As early as March, 1944, he was made a "Group Engineer," a supervisory position directing a group of engineers whose duties included the design and geometry of new airfoils, wings, and tails, and work

on the stalling characteristics of airplanes [R. 296-297, 800-801].

Obviously, from the foregoing, Garbell was hired and paid for creating, developing, and perfecting airfoil designs for Consolidated.

Concurrently with his original employment, Garbell executed a standard form of Invention Agreement [R. 633], the pertinent provisions of which are as follows:

> "1. The Employee agrees:
>
> (a) To disclose promptly in writing to the Company's Patent Department or to such person as the Company may designate, all inventions and improvements heretofore or hereafter made, developed, perfected, devised or conceived by the Employee either solely or in collaboration with others during the Employee's employment by the Company, whether or not during regular working hours, and including a period of one (1) year after termination of employment, relating to aircraft or parts and the manufacture thereof, or relating in any way to aviation or to the business, developments or products of the Company; and if so requested by the Company, to assign, transfer and convey to the Company all right, title and interest in and to all such inventions and improvements;
>
> *   *   *   *   *   *   *   *
>
> "6. If the Company shall fail to elect in writing that it desires to prosecute a patent application on any invention or improvement specified in paragraph 1 hereof within nine months following the complete disclosure thereof to the Company, then all rights of the Company in and to such invention or improvement

> shall revert to the Employee with the exception only that the Company shall have a free shop right with respect thereto. . . ."

The earliest evidence relating to the conception of the alleged invention of the patent in suit (other than Garbell's uncorroborated oral testimony) occurs in connection with an airplane known as the "Two-Engine Tailless Design," which was being designed by Consolidated in 1943 and 1944. Early in 1944, Garbell was working with two other Consolidated engineers, Fiul and Rogers, on the "Two-Engine Tailless Design" [R. 250, 294-296]. On February 25, 1944, the three of them submitted a joint report [Defts. Ex. A, R. 1007], which Garbell admitted at the trial embodied the wing construction of the patent in suit, and which recommended the use of such conception by Consolidated in its "Two-Engine Tailless" airplane being designed [R. 244-250, 303]. As will be noted, the report was "approved" by Mr. T. P. Hall on page 1 thereof. Mr. Hall was chief development engineer of Consolidated at that time.

Consolidated built a wind-tunnel model of the "Two-Engine Tailless," which incorporated the conception of the patent in suit [R. 308], and the last model made of this proposed airplane has such wing construction [R. 322]. Garbell and his engineering group analyzed the results of wind-tunnel tests of models of the airplane [R. 257, 294-295]. A series of Consolidated wind-tunnel tests and reports by Garbell thereon are detailed in the evidence [R. 735, 745, 755, 758, 759].

Additionally, Garbell recommended to Consolidated that the wing idea here in suit be used: In its Model 107 "Executive Transport" airplane; in its Model XB-46

bomber [R. 251-255]; and in its Model 110 transport [R. 275, 466-467].

Garbell, in his report dated March 2, 1945, Plaintiffs' Exhibit 25 [R. 666], plainly indicated that his alleged invention had, prior to that date, been successfully applied to the Tailless Design [Model 101], the executive transport [Model 107], and the XB-46 design, and "yields several satisfactory wings."

Garbell admits that he proposed to his employer Consolidated that it use his alleged invention of the patent in suit in its *XB-46* bomber, that the invention was incorporated in the plans for the bomber, and was incorporated in the prototype XB-46 airplane actually built by Consolidated in accordance with such plans [R. 251-256]. Garbell, on behalf of Consolidated, in May, 1945, had extensive conferences with N. A. C. A. representatives relative to the proposed XB-46, its design, and its further extensive testing, as is shown by his written report to defendant dated May 10, 1945 [R. 760-774].

Finally, Garbell admitted that he suggested that defendant Consolidated use in its proposed *Model 110* airplane the same wing construction principles that he had recommended for the "Two-Engine Tailless" design (*i. e.,* the alleged invention of the patent in suit) [R. 466-468]. The preliminary design work on the *Model 110* was initiated prior to the end of the war by Consolidated (*i. e.,* while Garbell was still employed by it), and it incorporated the three-control wing sections suggested by Garbell [R. 416-417]. The same wing sections were used by defendant in the Model 240 "Convair" here in suit [R. 418]. Such proposed design was incorporated in an

actual *Model 110* airplane that was built and extensively tested by Consolidated. It is significant in this connection that defendant's flight tests, Plaintiffs' Exhibit 35, upon which Garbell relied in attempting to show infringement by the Model 240 "Convair" [R. 442-444], include earlier flight tests of the *Model 110*.

From the foregoing, it is clear that Garbell while employed by defendant Consolidated and in the line of his employment, proposed that the alleged invention of the patent in suit be incorporated in at least four aircraft being designed by it, that such suggestions were approved and adopted and included in the design of such aircraft, that models of such aircraft were built and extensive wind-tunnel tests conducted thereon by Consolidated, and that in due course thereafter actual aircraft of the *XB-46* and *Model 110* types were built and extensively tested by defendant Consolidated.

Garbell testified that the wind-tunnel tests referred to in his patent in suit [R. 612] were those conducted by Consolidated in connection with its "Two-Engine Tailless" and its XB-46 aircraft, and were all done at the expense of defendant [R. 260-265].

At no time up to October 15, 1945, when he terminated his employment with Consolidated, had Garbell ever made any claim adverse to the use by Consolidated of the alleged invention of the patent in suit. To the contrary, during his employment by the defendant, Garbell at every opportunity suggested that Consolidated use the idea and encouraged its use, and, moreover, was active in his em-

CONVENTIONAL WING

DESIGNED TO AVOID TIP STALL

EXAMPLE TAKEN FROM PAGE 516, FIG. 6 – DEF. EXH. XXX

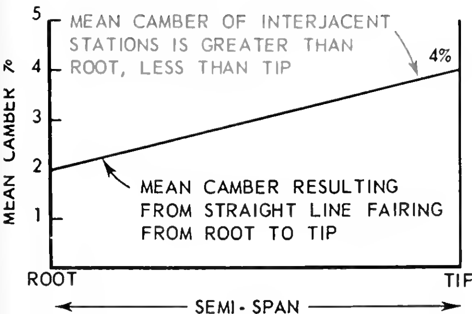
TIP
NACA 43009 AIRFOIL
MEAN CAMBER = 4%
THICK. RATIO = 9%

ROOT
NACA 23018 AIRFOIL
MEAN CAMBER = 2%
THICK. RATIO = 18%

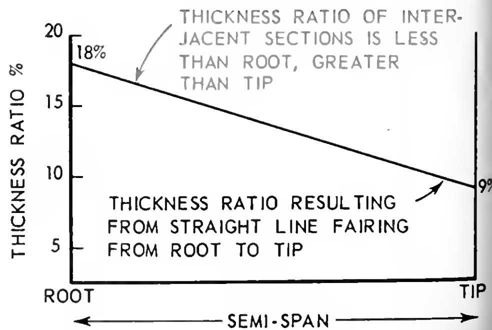
INTERJACENT STATIONS
DEVELOPED BY STRAIGHT LINE FAIRING FROM ROOT TO TIP

MEAN CAMBER { GREATER THAN ROOT / LESS THAN TIP
THICK. RATIO { LESS THAN ROOT / GREATER THAN TIP

SPANWISE DISTRIBUTION OF MEAN CAMBER



SPANWISE DISTRIBUTION OF THICKNESS RATIO



CONVENTIONAL AIRPLANE NOMENCLATURE

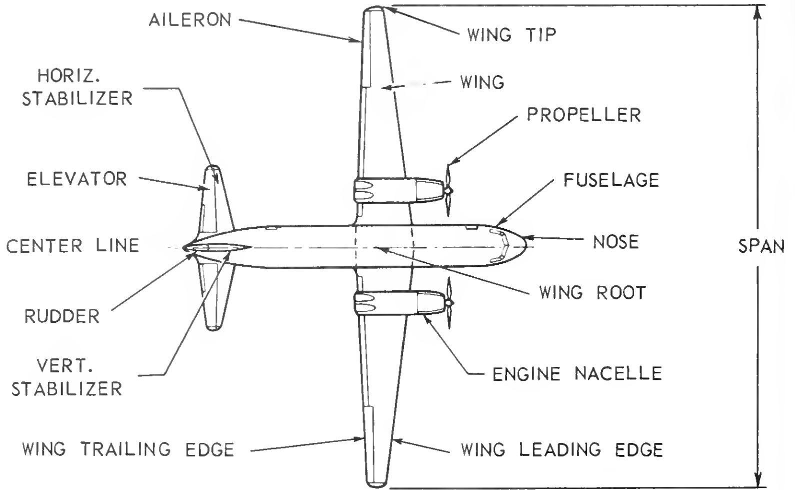


FIG. 1

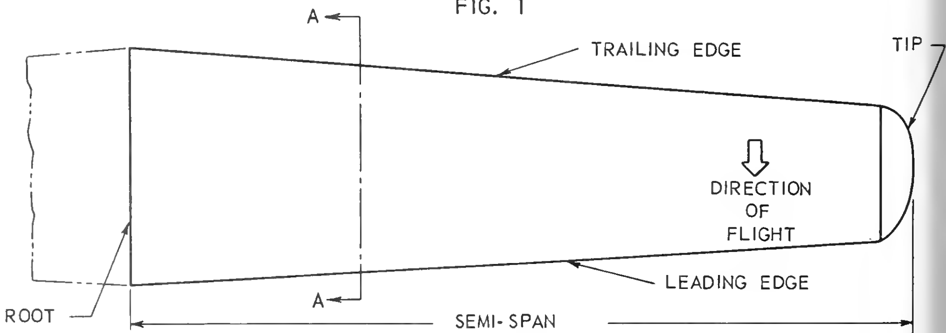


FIG. 2 - PLANFORM OF WING

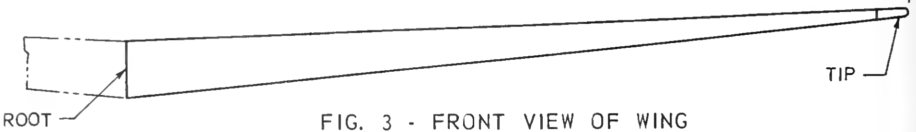


FIG. 3 - FRONT VIEW OF WING

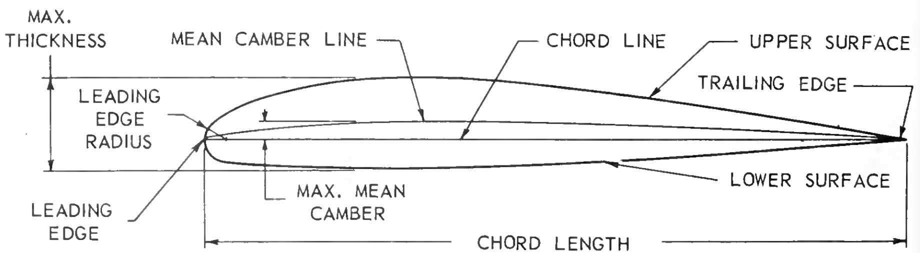


FIG. 4 - AIRFOIL SECTION A-A

ployment duties in supplying designs, supervising, and analyzing wind-tunnel tests on models incorporating the idea.

Garbell's application for the patent in suit was filed on July 16, 1946, less than one year after he left Consolidated.

D. A CONVENTIONAL AIRCRAFT WING. The aircraft art has developed and standardized its own lexicon of terms, which are used in the patent in suit and the evidence. Many of these are explained and defined in "Appendix A," and are illustrated by Plates I and II, following this page. Since the patent in suit relates to the geometry of an aircraft wing, it is first desirable to explain the geometry of a conventional wing.

It is conventional in the art to provide a tapered aircraft wing in which the root section has the smallest mean-line camber and the greatest thickness ratio, and the tip section has the greatest mean-line camber and the smallest thickness ratio, with straight-line or lineal fairing between the root and the tip. Such a conventional wing is fully described in Defendants' Exhibits UU and XXX, and is graphically illustrated by Plate III, following Plate II.

In such a conventional wing there are an infinite number of interjacent sections between the root section and the tip section, each of which has a mean-line camber that is greater than that of the root section and less than that of the tip section, and which has a thickness ratio

which is less than that of the root section and greater than that of the tip section. This, also, is plainly illustrated in Plate III.

The purpose of such construction in the conventional wing is to suppress stall at the tip of the wing and to cause the stall to initiate and to develop at an area inboard of the tip.

E. THE PATENT IN SUIT. The patent in suit likewise describes and claims a wing in which the root section has the smallest mean-line camber and the greatest thickness ratio, the tip section has the greatest mean-line camber and the smallest thickness ratio, and having one or more interjacent sections between the root and the tip having a mean-line camber greater than that of the root section and less than that of the tip section and which have a thickness ratio less than that of the root section and greater than that of the tip section. The primary object of the patent in suit is likewise to suppress stall at the tip and to cause the stall to initiate and develop at an area inboard of the tip. Up to this point, *the wing of the patent in suit is identical with the conventional wing.*

The only structural differences between the wing of the patent in suit and the conventional wing is that in the wing of the patent in suit the fairing between root and tip is not straight-line or lineal fairing but is non-lineal, this being accomplished by providing one or more interjacent sections between root and tip, each of which

has a mean-line camber *at variance with* (claims 2 and 3) or *greater than* (claim 1) that obtainable at such section by conventional straight-line fairing, or which has a thickness ratio *at variance with* (claims 5 and 6) or *less than* (claim 12) that obtainable by such straight-line fairing.

Neither the claims nor the specification of the patent in suit indicate the required extent of such "variance," although the specification teaches that the mean-line camber of the interjacent section shall "neither *exceed* the mean-line camber of the tip section nor *fall below* the mean-line camber of the root section" [Col. 4, lines 53-55], and that it may have "a value *equal to or slightly less* than" "that of the tip section" [Col. 7, lines 66-71].

In the patent in suit, the "interjacent control section" is located at either 55% or 60% of the semi-span from root to tip [Col. 8, lines 45-48; Col. 9, lines 1-9].

Stall inception and progression of the wing of the patent in suit are illustrated in Figure 3 thereof, which shows that "the stall inception occurs near mid-semi-span, spreads more prevalently inboardward and to a smaller extent outboardward" [Col. 5, lines 7-9]. Garbell testified that such stall inception should occur outboard of the tail of the aircraft [R. 183], and his "official disclosure of invention" to Consolidated similarly locates the stall inception [R. 780].

Garbell conceded that wings having stall inception inboardly of the tip at the mid-span and spreading laterally

across the wing [R. 176-177], and wings having stall inception at the root and spreading outboardly therefrom [R. 178-182], were old in the art before his alleged invention, and were not covered by his patent in suit.

F. Defendants' Accused Wing. This wing is embodied in an airplane designated by Consolidated as its Model 240 "Convair," which was an outgrowth of its earlier Model 110. Its construction is fully shown in the exhibits, and has an interjacent section located only 30.7% of the semi-span from root to tip [R. 1000-1005]. Such interjacent section has a mean-line camber greater than that of the root and less than that of the tip, and a thickness ratio less than that of the root and greater than that of the tip. The Model 240 wing has engine nacelles, twist, and fillets, all of which, the engineers agree, influence the over-all stall characteristics of defendants' wing.

The uncontroverted testimony of the witness Ward, a Consolidated aerodynamicist [R. 412] fully familiar with the Model 240 airplane and its flight tests, was that its stall initiated between the nacelle and the fuselage and was a "root stall" [R. 416, 419]. This, and the fact that such stall progresses only outboardly from the root, is confirmed by the affidavits of the engineers Matteson [R. 89] and Fox [R. 123] and the test report on the Model 240 [R. 113, 121]. In defendants' wing, there is no progression of the stall inboardly at any time. It is all outboard.

III.

Specifications of Error in the Findings of the District Court.

1. That the patent teaches an original or any method of aircraft wing construction having a stall which has its inception over a large area inboard of the lateral control surface and which spreads inboard and that the result is a special stall characteristic [F. VIII, R. 45], is erroneous because contrary to the patent, and unsupported by and contrary to the evidence; erred in failing to find that such stall has its inception over a relatively small area outboard of the aircraft tail and which spreads both inboardward and outboardward.

2. That the patent solved any problem in aircraft wing construction by the wing described in said findings [F. VIII, IX, X, R. 45-47], *are* erroneous because unsupported by and contrary to the evidence, and in not finding that such wing construction was old and said problem had been solved in the art long prior to the patent.

3. That the patent solved any stall problem in aircraft in producing a stall characteristic as described therein [F. XI, XII, R. 47], *are* erroneous because contrary to and unsupported by the evidence, and failing to find that such a stall characteristic had been achieved in the art long prior to the patent in suit.

4. That upon the disclosure of the alleged invention of the patent to defendant Consolidated, the same was rejected by it [F. XIII, R. 48] is error because contrary to the evidence.

5. That the patent has a principle of operation unknown to the art prior thereto [F. XIV, R. 48], is error because there is no evidence to support it, is contrary to

the evidence, and in not finding that such principle of operation was old in the art long prior thereto.

6. That the prior art does not disclose any knowledge, use, or development of a wing which would operate upon the principle or which would produce the result of that of the patent [F. XV, R. 48], is erroneous as contrary to the evidence which shows that that result was old in the art.

7. That any invention was involved in the patent [F. XVI, R. 48] is error because unsupported by and contrary to the evidence, which shows that the combinations defined in each of claims 1, 2, 3, 5, 6 and 12 in suit lack invention and differ only in degree.

8. That the combination of the claims in suit was novel [F. XVII, R. 48] is erroneous because the claims are anticipated by the art; and in not finding that all of such claims are devoid of novelty over the prior art.

9. That defendants have not sustained the burden of proof in establishing prior manufacture, use, sale, and knowledge of the alleged invention of the patent [F. XVIII, R. 49] is erroneous, contrary to the evidence; and in failing to find that defendants have sustained such burden.

10. That the structures relied upon by defendants in the aircraft referred to by defendants' witnesses do not incorporate, describe, or show prior knowledge of a wing having a mode of operation or producing the result of that of the patent in suit as described [F. XIX, R. 49] is error, being contrary to the evidence.

11. That none of the prior-art references relied upon by defendants suggests or teaches the desirability of inducing an initial stall over a wide area of an interjacent

section so that the stall will proceed inboardly toward the root [F. XX, R. 49], is error, being contrary to the evidence.

12. That the prior art does not teach or disclose knowledge of a wing having the stall characteristics set forth in the patent in suit [F. XXI, R. 50] is erroneous as not supported by and contrary to the evidence.

13. That the claims in suit point out or distinctly claim the alleged invention [F. XXII, R. 50], is error because unsupported by the evidence, and erred in failing to find that such claims fail to meet the requirements of Title 35, U. S. C. A., Section 33.

14. That the invention of the patent advanced the scientific knowledge of the art [F. XXIII, R. 50], is error because unsupported by and contrary to the evidence.

15. That the alleged invention of the patent was not obvious to those skilled in the art [F. XXIV, R. 50] is erroneous; and erred in not finding that the evidence shows the alleged invention was obvious to those skilled in the art prior to Garbell's alleged invention thereof.

16. Findings XXV, XXVI, and XXX, and Conclusions III and IV [R. 51, 52, 56-57] are erroneous in finding that the Convair Liner, Model 240, infringes the claims in suit, because they are not supported by and are contrary to the evidence.

17. That the specification of the patent is in clear, concise, and exact terms sufficient to enable any person to make or use the same, and that it sets forth the principle of the alleged invention and the best mode of applying such principle [F. XXIX, R. 52], is erroneous because contrary to law and unsupported by the evidence.

18. That no evidence was offered on behalf of defendants to controvert plaintiffs' proof of infringement or to show the absence of infringement and departure of the accused device from the teachings of the patent in suit [F. XXXI, R. 52], is erroneous in law because of the insufficiency of proof of infringement, and as contrary to fact.

19. Finding XXXII and Conclusion II [R. 52, 56] that the claims in suit are good and valid and cover a new and meritorious invention entitling the patent to a liberal interpretation are erroneous in law and unsupported by and contrary to the evidence.

20. That defendants have not established their defenses of a shop-right license and an implied license under the patent [F. XXXIII, XXXIV, XLVI, R. 53, 55], is erroneous because contrary to law and to the evidence; and erred in failing to find that defendants at all times have had an express as well as an implied license under the patent.

21. That the alleged invention of the patent was made by Garbell prior to his employment by Consolidated [F. XXXV, R. 53], is erroneous as contrary to law and unsupported by the evidence.

22. That Garbell disclosed his alleged invention to others prior to his employment by Consolidated [F. XXXVI, R. 53], is error because contrary to law and not supported by the evidence.

23. That the alleged invention of the patent was rejected by Consolidated [F. XXXVII, R. 53], is error because contrary to law and to the evidence.

24. That the alleged invention of the patent was not developed, perfected, devised, or conceived by Garbell

during his employment by Consolidated [F. XXXVIII, R. 53], is error because contrary to law and unsupported by and contrary to the evidence.

25. That Consolidated took no steps during the employment of Garbell by it to develop or perfect the alleged Garbell invention [F. XXXIX, R. 54], is error because unsupported by and contrary to the evidence; and erred in failing to find that the alleged invention was developed and perfected by and at the expense of Consolidated during such employment.

26. That Consolidated first used the alleged invention of the patent months after Garbell had left its employ without notice to him and after a rejection of the invention [F. XL, R. 54] is error because contrary to the evidence which shows that Consolidated used and tested said alleged invention during his employment by it and with his full knowledge, consent, instigation and approval; and erred in failing to find that such use and tests by Consolidated are represented by Garbell in the patent in suit to be demonstrations of his patent.

27. That Consolidated has never paid, tendered, or offered to pay, under the Invention Agreement, PX-16, the sum of $10.00, or any other sum, to Garbell [F. XLI, R. 54] is erroneous in law because such sum did not accrue to him for the license granted in the agreement, and is contrary to the evidence.

28. The District Court erred in failing to find that at all times while employed by Consolidated, Garbell performed and worked under the Invention Agreement, and by his conduct has recognized that the express license or shop-right is and at all times has been in full force and effect.

29. That during Garbell's employment by Consolidated, it did not at any time assert any right, privilege, or license to the alleged Garbell invention [F. XLII, R. 54], is erroneous as a matter of law and because contrary to the evidence.

30. That offers by Garbell to Consolidated during his employment by it to the use of the alleged invention of the patent were rejected by it [F. XLIII, R. 54], is contrary to law and the evidence.

31. The District Court erred in failing to find that the first assertion by Garbell that he had any rights in the invention of the patent in suit independent of or adverse to Consolidated was made by him long after he had left its employ.

32. That the invention of the patent was complete prior to Garbell's employment by Consolidated [F. XLV, R. 55] is erroneous in law, and in finding that nothing was added thereto and there was no practical carrying out of the invention by Garbell or by Consolidated during his employment by it, as the same is contrary to the evidence.

33. That plaintiffs are entitled to an injunction [F. XLVII, R. 55] is erroneous in law and not supported by the evidence.

34. That the action should be referred to a special master for an accounting [F. XLVIII, R. 56], is erroneous because not supported by the evidence.

35. The District Court erred in failing to grant defendants' motion for a new trial, as the same was well founded in law and fact.

IV.

ARGUMENT.

POINT ONE.

The Alleged Invention Was Not Made Prior to Garbell's Employment by Defendant Consolidated.

The District Court found that Garbell "made" the alleged invention of the patent in suit prior to his employment by defendant Consolidated, and that he fully disclosed it to others prior to such employment [F. XXXV and XXXVI, R. 53]. The error in these findings will immediately be apparent.

As pointed out above, the only evidence offered to support plaintiffs' claim of conception by Garbell prior to his employment is Garbell's oral testimony, wholly uncorroborated by anything [p. 3, *supra*]. While Garbell testified that he had earlier disclosed his idea to Platt and Chin, neither was called as a witness by plaintiffs, nor was their absence explained. The record shows that both Garbell and plaintiffs' attorneys prior to trial had a number of conferences about the lawsuit with Chin, who lives in San Francisco [R. 1115], but he was not called as a witness by them. The legal presumption from this failure to call is that had Platt and Chin been called as witnesses they would have testified adversely to Garbell and the plaintiffs. (See: *Interstate Circuit v. United States,* 306 U. S. 708, 59 S. Ct. 467, 83 L. Ed. 610; *Hann v. Venetian Blind Corp.,* 111 F. 2d 45 (C. C. A. 9th, 1940).)

As a matter of fact, Chin's testimony denying Garbell's assertion of early disclosure to Chin was offered by defendants on their motion for a new trial [R. 66], but

the District Court refused to permit such testimony [R. 497], stating in effect that even if Chin had testified, it would not have affected the District Court's conclusions [R. 496].

In any event, we submit that the uncorroborated oral testimony of Garbell is insufficient to carry back his date of alleged invention to any time prior to his employment by Consolidated in 1942. It must be remembered that plaintiffs are trying to carry such date back from July 16, 1946, the date of application for the patent in suit, to 1939, a period of seven years, upon such wholly uncorroborated oral testimony of the patentee, who is also president of both plaintiff corporations, given eleven years after the event. Such uncorroborated oral testimony is insufficient to carry a date of invention back of the application filing date. (See: *McIlvaine Patent Corp. v. Walgreen Co.,* 44 Fed. Supp. 530 (D. C. Ill., 1942; aff'd 138 F. 2d 177; *United States Rubber Co. v. Sidney Blumenthal & Co., Inc.,* 98 F. 2d 767 (C. C. A. 2d 1938); *United States Shoe Machine Corp. v. Brooklyn Wood Heel Corp.,* 77 F. 2d 263 (C. C. A. 2d 1935); *Twentieth Century Machinery Co. v. Loew Mfg. Co.,* 243 Fed. 373 (C. C. A. 6th, 1917); *National Mach. Corp. v. Benthall Mach. Co.,* 241 Fed. 72 (C. C. A. 4th, 1916).)

The "making" of the invention by Garbell prior to employment, relied upon by plaintiffs, was his mere mental concept, divorced from any objective act. Under well-established legal principles, mere mental conception, even if believed, is not "making the invention." This was pointed out succinctly by this Court in *Hann v. Venetian Blind Corp.,* 111 F. 2d 455 at 458 (1940), the quotation appearing in Appendix B, page 1.

A case directly in point is *Conway v. White*, 9 F. 2d 863 (C. C. A. 2d, 1925). There plaintiff was attempting to require specific performance of a covenant by an employee defendant to assign to his employer inventions made during the employment. The employee contended (just as plaintiffs do here) that the invention was made by him prior to his employment. The first machine actually embodying the invention was made during the employment, and the Court *held* that the date of "making" of the invention was the date of completion of such machine, not some earlier conception date.

The rule was early applied in *Clark Thread Co. v. Willimantic Linen Co.*, 140 U. S. 481, 11 S. Ct. 846, 35 L. Ed. 521 (1891), where the Supreme Court held that an invention was not made until embodied in concrete form, saying:

> "It is evident that the invention was not completed until the construction of the machine. A conception of the mind is not an invention until represented in some physical form . . ."

To the same effect, and for the citation of additional decisions supporting the rule, see: *Walker on Patents, Dellers Edition,* pages 298-299.

There is absolutely no evidence of any kind in this action that Garbell ever reduced to practice the alleged invention of the patent in suit prior to his employment by Consolidated. In fact, Garbell stated that prior to such employment no airfoil embodying his invention had ever been designed by *anybody* for an airplane [R. 239]. Therefore, under the law and facts, the alleged invention was not "made" prior to Garbell's employment, and Findings XXXV and XXXVI are clearly erroneous. Also

plainly erroneous is Finding XLV, in which the District Court found that the invention was "complete" before Garbell's employment by Consolidated. Since there was no embodying of the idea in physical form or other reduction to practice before such employment, under the above law the alleged invention obviously was not "complete."

POINT TWO.

The Alleged Invention Was Made While Garbell Was Employed by Defendant Consolidated.

The District Court found [F. XXXVIII, R. 53] that the alleged invention was not made, developed, perfected, devised, or conceived by Garbell during his employment by Consolidated. This, we submit, is clearly erroneous because if the invention was not "made" prior to such employment as shown in the preceding section, it must have been "made" during such employment, as it was embodied in physical form, reduced to practice, and its practicability fully demonstrated during such period. This Court need look no further than the admissions of Garbell to satisfy itself of this.

The patent in suit flatly states [R. 612, Col. 10, lines 50-64] that numerous wind-tunnel tests had "demonstrated convincingly that each of the objects of this invention have been fully achieved." Garbell admitted that such wind-tunnel tests included those made by Consolidated of its "Two-Engine Tailless Design" and its XB-46 bomber [R. 260-262], which were made during his em-

ployment and which incorporated the alleged invention of the patent in suit. Likewise, Garbell's memo dated March 2, 1945, Plaintiffs' Exhibit 25 [R. 666], plainly admits that "the 'tri-section wing' principle which has been *successfully* applied to the Tailless design, the executive transport, and the XB-46 design, yields several satisfactory wings." Also, Garbell's official disclosure of invention to Consolidated, Defendants' Exhibit D, likewise indicates that the construction had been successfully "tested" [R. 783]. Garbell's admissions, therefore, clearly establish that the alleged invention of the patent in suit was reduced to practice and its practicability fully demonstrated by the work done at Consolidated during his employ by it.

Under *Hann v. Venetian Blind Corp., supra,* and the other authorities set forth in the preceding section of this brief, the alleged invention of the patent in suit was therefore reduced to practice by Consolidated during Garbell's employment by it, and we suggest that as a matter of law the invention must be considered as "made" during such period. As held in the *Hann case, supra,* an invention is not made or completed when it is merely conceived; to complete the invention, it must be reduced to practice.

Likewise, clearly erroneous is Finding XXXIX [R. 54], in which the District Court found that Consolidated took *no* steps to develop or perfect the "Garbell invention" during his employment. As shown by the facts and admitted by Garbell, Consolidated made wind-tunnel

models for its "Two-Engine Tailless," its XB-46, and its Model 110, and fully tested them over many months at its own expense, to determine whether wings embodying the alleged invention in suit were practical, and the patent in suit refers to them as establishing the same.

However, we further submit that the evidence indicates that the alleged invention was actually conceived, as well as reduced to practice, while Garbell was employed by Consolidated. The earliest documentary evidence of the alleged invention is the report on the proposed "Two-Engine Tailless Design," submitted in the line of duty by the engineering group composed of Fiul, Rogers, and Garbell, Defendants' Exhibit A [R. 1007], which is dated February 25, 1944. It was not, however, until December 1944, that Garbell submitted his formal disclosure of the alleged invention, Defendants' Exhibit D [R. 775], which he characterized as an "official disclosure of Invention" [R. 789]. Although Garbell was employed on August 7, 1942, and was required by his Invention Agreement [R. 633] "to disclose promptly in writing to the Company's Patent Department" all inventions made by him while employed by it, why was it that he waited until December 1944 to make this particular disclosure? This is unexplained in the evidence, and, we respectfully submit, the only logical inference is that he in fact conceived the alleged invention while so employed.

It is therefore submitted that the alleged invention was both conceived and reduced to practice during Garbell's employ by Consolidated.

POINT THREE.

Defendants Have an Express License Under the Patent in Suit Which Is a Bar to This Action.

The Invention Agreement, Defendants' Exhibit C [R. 633], required that Garbell promptly disclose to Consolidated all inventions *"made, developed, perfected, devised,* or *conceived"* by him during his employment and for one (1) year thereafter. The application for the patent in suit was filed by Garbell within one year after the termination of his employment. Under the agreement, Consolidated had the option to acquire all patent rights to any invention disclosed to it under the agreement, but in the event that it did not exercise such option it still retained a "free shop right" (*i. e.,* a non-exclusive, free license) thereto [*See:* Par. 6, R. 637].

The alleged invention of the patent in suit was officially disclosed by Garbell to Consolidated by his written disclosure dated December 5, 1944, Defendants' Exhibit D [R. 775]. It is to be noted that such disclosure is written on Company stationery, and there is nothing therein to indicate that the conception originated other than as a company project. The disclosure characterizes the conception as a "tested *new* method of airfoil selection" (p. 1) and referred to actual photographs showing "experimentally obtained" characteristics of the wing (p. 9). The disclosure was submitted by Garbell with an intercompany memo dated December 19, 1944 [R. 789], which states: "Please consider this paper an *official disclosure of invention.*" The disclosure was made to Consolidated's

patent department, exactly as required by Paragraph 1 of the Invention Agreement. It was not submitted to defendant's management, nor was it submitted as an independent or outside idea. *Eight* other alleged inventions were also submitted by Garbell under his Invention Agreement [R. 353], of which *five* were submitted by him prior to that here at issue, and as to *two* of which Consolidated exercised its option rights under the Invention Agreement and made money payments to Garbell [R. 361-362]. This was not denied by Garbell. This shows the obvious error in Finding of Fact XLI, in which the District Court found that defendant never paid or tendered any sum to Garbell under the Invention Agreement.

The only reasonable interpretation of the foregoing evidence, we respectfully submit, is that Garbell at all times honored and worked under the Invention Agreement, and that when, on December 19, 1944, he submitted his "official disclosure" of the alleged invention of the patent in suit, he did so under and in accordance with the Invention Agreement and that the District Court should have so found. Obviously, if Garbell in fact submitted such disclosure in accordance with the Agreement, it is a direct admission by him that the alleged invention was *made, developed, perfected, devised,* or *conceived* by him during his employment, as otherwise he would have been under no obligation to have made such official disclosure.

It is well established in the law that the actions of the parties construing a contract should be followed by the courts in interpreting the contract. (*See: District of Columbia v. Gallaher,* 124 U. S. 505, 31 L. Ed. 526, 527; *Mitau v. Roddan,* 149 Cal. 14, 84 Pac. 145, 6 L. R. A. 275, 281.)

It is therefore submitted that Garbell himself construed his alleged invention of the patent in suit as falling within the terms of his Invention Agreement and licensed thereby, and that this should have been an end to the matter. Actions speak louder than words. It is further submitted that the District Court's Findings of Fact XXXIII, XLV, and XLVII are obviously erroneous as clearly contrary to the weight of the evidence and unsupported by any competent evidence.

POINT FOUR.

Defendants Have an Implied-in-Law License Under the Patent in Suit Which Is a Bar to This Action.

The patentee Garbell, starting in 1944, at every opportunity during his employment by Consolidated urged it to use the alleged invention of the patent in suit, and it did so in the design and testing of its "Two-Engine Tailless Design," its XB-46 bomber, its executive transport, and its Model 110 airplane which was the forerunner of the Model 240 "Convair" here in suit.

Under the law, this plainly created an implied-in-law license to defendant to continue to use the construction. The general rule as to implied licenses is stated in *De Forest Radio Telephone & Telegraph Co. v. United States*, 273 U. S. 236, 71 L. Ed. 625, quoted in Appendix B, pages 1 and 2.

A case in point with plaintiffs' claimed statement of facts in this case is *Elzilaw Co. v. Knoxville Glove Co.*, 22 F. 2d 962 (C. C. A. 2d, 1927). There an employee had actually filed a patent application on an invention before employment but during employment urged his employer to use the invention. The attempts of the employer were unsuccessful during the employment, but

finally after termination of the employment it was successful and started to make and sell devices which included the invention. The Court held that the employer had an implied license which barred the action, the pertinent language of the decision being quoted in Appendix B, page 2.

A similar factual situation was present in *Tin Decorating Co. v. Metal Package Corp.*, 29 F. 2d 1006 (aff'd 37 F. 2d 5, and cert. den.), in which the Court found an implied license, pertinent portions of the opinion being quoted in Appendix B, page 3.

The rule in this Circuit as to shop-right or implied license is stated in *Gate-Way v. Hillgren,* 82 Fed. Supp. 546 (D. C. Calif., 1949, aff'd 181 F. 2d 1010), pertinent portions of the decision being quoted in Appendix B, pages 3 and 4.

For many other decisions finding a shop-right or implied license in an employer as to an employee's invention from activities no more favorable to the employer than in the present case, *see:* Annotations in 16 A. L. R. 1204; 32 A. L. R. 1041; 44 A. L. R. 593; 85 A. L. R. 1522, and 153 A. L. R. 1002.

It is therefore submitted that defendant has a free implied-in-law license (*i. e.,* shop-right) to use the alleged invention of the patent in suit, which is a complete bar to this action. We submit that Findings XXXIV and XLVI, finding no shop-right or implied license, are clearly erroneous in law and fact.

In Findings XIII, XXXVII, XL, and XLIII, the District Court found that defendant "rejected" the alleged invention. This misconception of the facts apparently was the controlling factor in the decision of the case by the District Court, as it is adverted to strongly in the Memo-

randum Decision [R. 40-43], the pertinent portions being quoted in Appendix B, page 4. Obviously, defendant Consolidated did not consider the alleged invention "impractical," nor did it "reject" it, as it adopted and used the idea in its "Two-Engine Tailless Design," in its executive transport, in its XB-46 bomber, and in its Model 110, all at the suggestion of Garbell.

The misconceptions of the trial court as to the evidence are illustrated by its statement that the invention was disclosed to "the head of defendants' Patent Department, on March 2, 1945, and passed through channels, bears the final rejection in a pencilled notation, 'Not (interested) at this time.' (Plaintiff's Exhibit 25.)" Exhibit 25, as it and the evidence show, was a suggestion by Garbell that his wing idea be used as an alternate wing in the Model 37 airplane already built, and was made to *T. P.* Hall, chief engineer, not to *D. A.* Hall, of the Patent Department. Exhibit 25 was not sent to defendants' Patent Department at all, and there is no suggestion in the evidence that it was ever seen by the Patent Department. The "pencilled notation" by T. P. Hall obviously was merely a decision not to adopt Garbell's suggestion *for that particular airplane at that particular time;* it was not "rejection" of the invention. The District Court, after entering such Memorandum Decision, so interpreting the facts, then refused to permit testimony by T. P. Hall to explain the Exhibit 25 and his notation thereon [Defts. Motion for New Trial, R. 65]. We suggest that Findings XXVII, XL, and XLIII are obviously unfounded and contrary to the evidence.

POINT FIVE.

The Claims in Suit Are Invalid for Anticipation by and Lack of Invention Over the Prior Art.

(a) The Prior Art—In General.

So far as this record shows, no airplane which manifested undesirable tip stall was ever continued in use. The design of the wing was promptly changed by varying the geometry, including the camber and thickness relationships of the wing sections to eliminate tip stall and move the initial stall area inboard. The variations were made according to the teachings of world-wide-known literature and common knowledge of aircraft designers.

Among this literature, *N. A. C. A. Report No. 627* [part of DX-UU] describes twenty-two wings of different taper ratio specifically designed to avoid tip stall. Page 14 states:

> "The tapered N.A.C.A. 23013-43010 (Fig. 19) is an example of a wing designed to avoid tip stalling. In order to stall at the center, a combination of moderate taper, washout and progression to sections having increasing CL max (increased camber) toward the tips was used."

The *N. A. C. A. Report 703* [DX-XXX], entitled "Design Charts Relating to the Stalling of Tapered Wings," provides a comprehensive discussion of the problem and of the technical aspects thereof. It stated four methods of moving stall inception inward from the wing tip to avoid tip stall, one of which was to increase the mean-line camber from root to tip and to decrease the thickness ratio therebetween (pp. 1-2). It pointed out that the point of stall inception is the point of tangency

of the CL and CL max. curves (pp. 2-3), and that the rate of separation of the lift-distribution curves indicates the rate of stall progression in both directions from the point of tangency (p. 6), which was confirmed by plaintiffs' witness Garbell [R. 195-199]. In its Figure 6 (p. 4), it shows lift-distribution curves for such a cambered wing. in which the rate of separation of the two curves inboard is much less than that outboard of the point of tangency (*i. e.,* stall origin), which plainly indicated from the general teaching of the report that stall inception in such wings occurs at about 60% of semi-span and progresses inboardly at a faster rate than outboardly, a result set forth and attributed to the patent in suit [R. 610, Col. 5, lines 7-9].

N. A. C. A. Note 713, page 3 [R. 868] is directed to avoid tip stalling of tapered wings, and states:

> "The increase in camber produces an increase in CL max of the sections near the tips and thereby causes the stalling point to move inward."

These wings prevented tip stall and retained straight-line fairing, for the obvious reason that straight-line fairing produces a more simple and therefore less costly structure. Deviation from linear fairing is not an object sought but a mere incident of relative camber variation in different stations of the wing, which designers and builders may desire to avoid to provide simplicity in fabrication. Nonetheless, the desired stall characteristics were conventionally achieved by camber and thickness variation distributed spanwise of the wing. In consequence, the prevention of tip stall by means of variation in camber and thickness ratio was an old and well-known expedient in aircraft wing design. The Examiner [file

wrapper, PX-33] correctly stated: "by well known means a wing may be designed to stall at any point."

Wings which utilized variation in the spanwise distribution of cambers and thickness which deviated from linear fairing for avoiding tip stall were also widely known and used.

The Royal Aeronautical Society article [DX-WW, R. 905, 906], states:

> "In predicting the point where stalling will first occur, it is necessary to make allowance for the actual stalling angle of a section at any point of the span, and by varying the geometric angle and the characteristics of the section (thickness/chord ratio and camber) it should be possible to control to some extent the commencement of burbling in relation to the wing plan form."

That the author of this article contemplated more than linear spanwise variation of camber from a root section of smallest camber to a tip section of greater camber is clearly shown in Figure 12a [R. 909] in which a wing is graphically depicted having the following section characteristics:

	Root Section	Section at .62 Semi-Span	Tip Section
Mean Camber	2%	6%	6%
Thick Ratio	15%	10%	2%

Since the camber at the interjacent section is *equal* to the camber at the tip, it must be greater than the camber at the same station obtained by linear fairing, and there-

fore the showing clearly meets those claims of the patent in suit in which the camber at the intermediate station is either *at variance* from or is *greater* than the linear.

Exhibit CCC [R. 950], published in England in 1938, states:

> "A better method of preventing tip stalling, or one which may be profitably employed in conjunction with a small degree of twist, is to increase the camber from root or tip, or at least over the outer section of the wing. * * * Another solution to the tip-stalling problem to be used with camber variation, is provided by suitable grading of wing thickness over the outer portion of the span,"

This camber variation over the *outer sections* of the wing inherently results in non-lineal fairing and in camber increase from root to tip, for preventing tip stall, either alone, or when combined with thickness variation.

Zien's article [DX-XX, R. 913], plainly points out that by profile (*i. e.,* airfoil section) variation, airflow separation (*i. e.,* stall) can be made to occur at the wing tip later than at the center of the wing, and that lateral stability is "guaranteed even at stall by the delayed separation of the flow at the wing tips" [R. 913]. It states that the camber should be proportionately large at the wing tips [R. 926], and that wind-tunnel tests had shown that with a highly tapered wing having a tip with a large section-lift coefficient (*i. e.,* large camber), the stall starts at the center of the wing [R. 930]. Finally, in Figure 12 [R. 935], it gives the sections of a five-section wing in which the root has the least camber and greatest thickness ratio, and the tip has the greatest camber and the least thickness ratio and interjacent sections having a camber greater

and a thickness ratio less than that obtainable by straight-line fairing [R. 400-402, 468-472]. These ratios are graphically shown in Defendants' Exhibit RRR [R. 933, 403], and are applied against claim 1 of the patent in Plate IV adjoining this page. The article fully explains the profile systematics and the magnitude and position of the camber and the thickness ratio in controlling the spanwise distribution of lift coefficients for moving the stall point inwardly from the tips. Here are taught all the necessary factors and calculations for the selection of airfoil sections distributed spanwise for eliminating tip stall and initiating the stall adjacent the mid-span of the wing which inherently results in camber and thickness deviation.

Again, a sailplane called the "Wippsterz" is described in a 1937 publication [DX-AAA, R. 939], having a three-section wing in which the root section has the least mean-line camber and greatest thickness ratio, the tip has the greatest mean-line camber and the least thickness ratio, and the interjacent section has a mean-line camber and thickness ratio at variance with that obtainable by straight-line fairing [R. 405-406]. The geometry of this wing is shown graphically in Defendants' Exhibit SSS, which shows that in the "Wippsterz" the interjacent section had a mean-line camber *greater* than that obtainable by straight-line fairing, and a thickness ratio *less* than that obtainable by straight-line fairing. The "Wippsterz" construction is applied against claim 12 of the patent in suit in accompanying Plate V.

Defendants' Exhibit VV [R. 894], a 1936 publication, describes a wing used by Curtiss-Wright Airplane Co., composed of airfoil sections in which the under side of the leading edge of the wing is faired out and the leading

'LUFTFAHRTFORSCHUNG" (1938) - DEF. EXHIBIT -XX
APPLIED TO CLAIMS OF GARBELL PATENT IN SUIT

CLAIM I A LIFTING SURFACE WITH THREE OR MORE CONTROLLED FLUID-FOIL SECTIONS, IN WHICH

THE FIRST SECTION WITH THE SMALLEST MEAN-LINE CAMBER IS LOCATED AT THE ROOT,

THE SECOND SECTION WITH THE GREATEST MEAN-LINE CAMBER IS LOCATED AT THE FLUID-DYNAMICALLY EFFECTIVE TIP,

AND THE THIRD OR ADDITIONAL FLUID-FOIL SECTIONS ARE LOCATED AT STATIONS INTERJACENT BETWEEN THE ROOT AND THE TIP, WHEREIN THE VALUES OF THE MEAN-LINE CAMBER OF THE INTERJACENT FLUID-FOIL SECTIONS ARE GREATER THAN THE VALUES OF THE MEAN-LINE CAMBER OBTAINABLE AT THE RESPECTIVE SPANWISE STATIONS BY MEANS OF STRAIGHT-LINE FAIRING BETWEEN THE FLUID-FOIL SECTION LOCATED AT THE ROOT OF THE LIFTING SURFACE AND THE FLUID-FOIL SECTION LOCATED AT THE TIP OF THE LIFTING SURFACE.

INTERJACENT SECTION NO. 2
NACA 4415 AIRFOIL
MEAN CAMBER = 4%
THICK. RATIO = 15%

TIP
NACA 6409 AIRFOIL
MEAN CAMBER = 6%
THICK. RATIO = 9%

INTERJACENT SECTION NO. 1
NACA 2418 AIRFOIL
MEAN CAMBER = 2.0%
THICK. RATIO = 18%

INTERJACENT SECTION NO. 3
NACA 6412 AIRFOIL
MEAN CAMBER = 6%
THICK. RATIO = 12%

ROOT
NACA 0021 AIRFOIL
MEAN CAMBER = 0%
THICK. RATIO = 21%

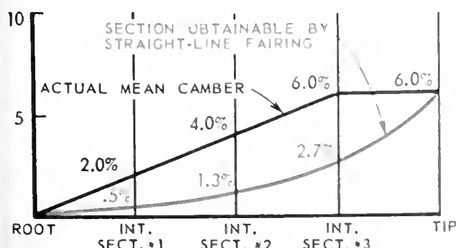
SECTION OBTAINABLE BY STRAIGHT LINE FAIRING FROM ROOT TO TIP
MEAN CAMBER = 2.7
THICK. RATIO = 15.6

SECTION OBTAINABLE BY STRAIGHT LINE FAIRING FROM ROOT TO TIP
MEAN CAMBER = 1.3
THICK. RATIO = 18.5

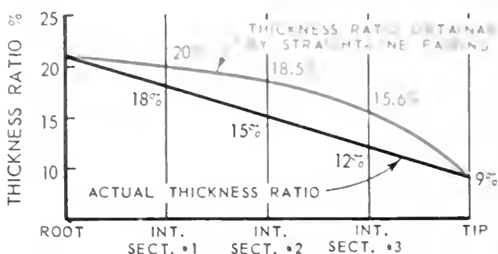
SECTION OBTAINABLE BY STRAIGHT LINE FAIRING FROM ROOT TO TIP
MEAN CAMBER = .5
THICK. RATIO = 20

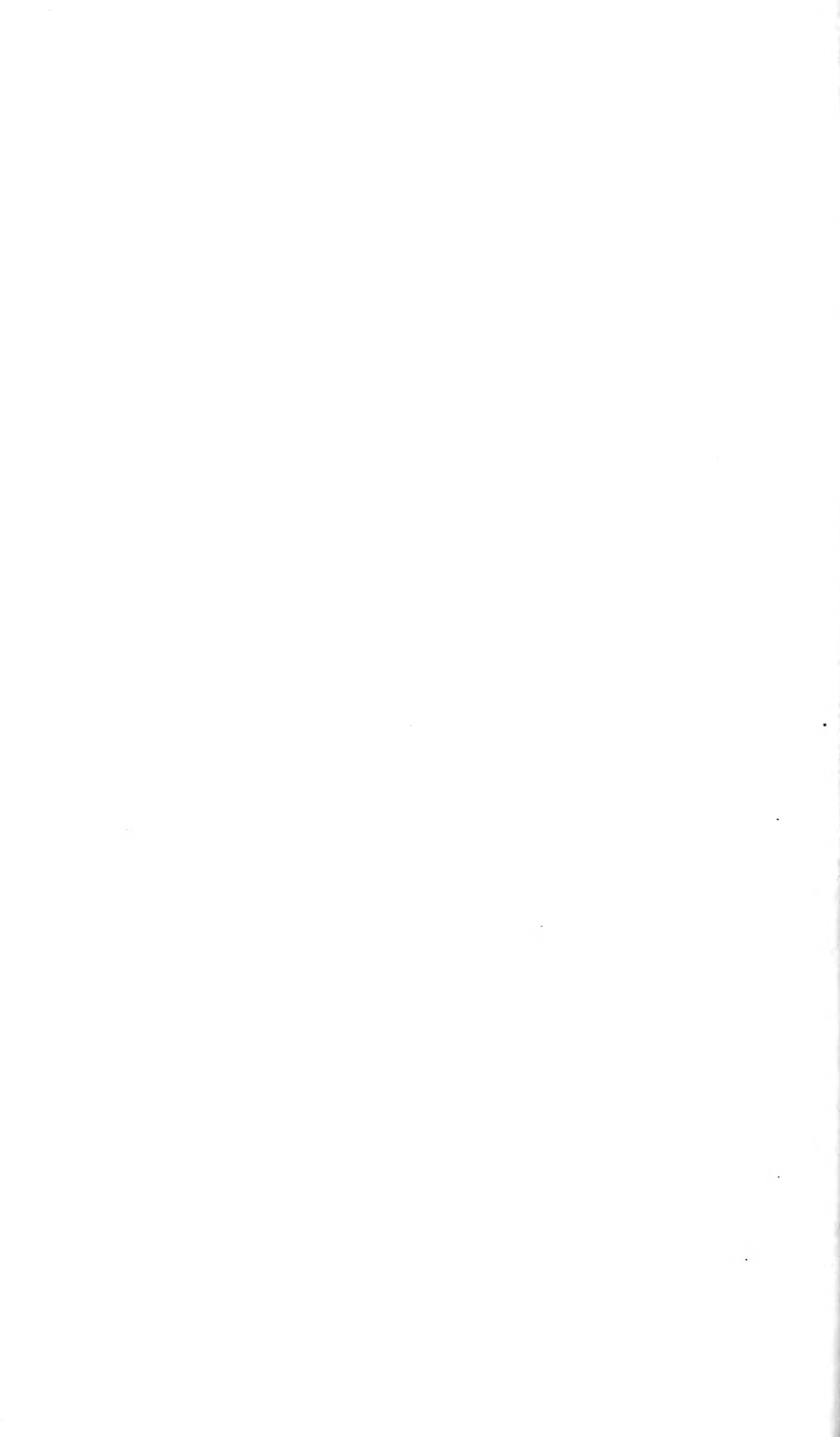
) SEE CLAIMS IN
#2, 3, 5, 6, & 12

SPANWISE MEAN CAMBER DISTRIBUTION



SPANWISE THICKNESS RATIO DISTRIBUTION





THE FS16 "WIPPSTERZ" SAILPLANE
APPLIED TO CLAIMS OF GARBELL PATENT IN SUIT

CLAIM 12 A LIFTING SURFACE WITH THREE OR MORE CONTROLLED FLUID-FOIL SECTIONS, IN WHICH

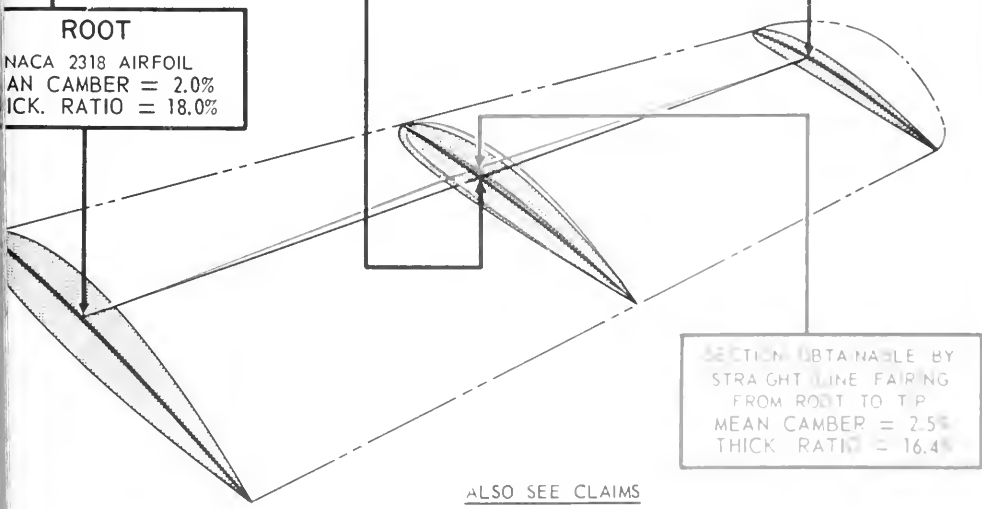
THE FIRST SECTION WITH THE SMALLEST MEAN-LINE CAMBER AND GREATEST THICKNESS RATIO IS LOCATED AT THE ROOT,

THE SECOND SECTION WITH THE GREATEST MEAN-LINE CAMBER AND SMALLEST THICKNESS RATIO IS LOCATED AT THE FLUID-DYNAMICALLY EFFECTIVE TIP,

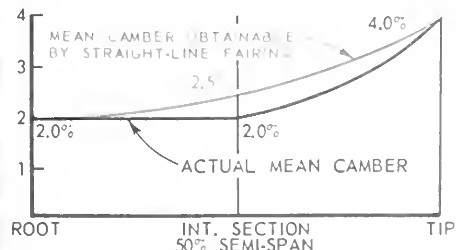
AND THE THIRD OR ADDITIONAL FLUID-FOIL SECTIONS ARE LOCATED AT STATIONS INTERJACENT BETWEEN THE ROOT AND THE TIP, WHEREIN THE VALUES OF THE THICKNESS RATIO OF THE INTERJACENT FLUID-FOIL SECTIONS ARE SMALLER THAN THE VALUES OF THE THICKNESS RATIO OBTAINABLE AT THE RESPECTIVE SPANWISE STATIONS BY MEANS OF STRAIGHT-LINE FAIRING BETWEEN THE FLUID-FOIL SECTION LOCATED AT THE ROOT OF THE LIFTING SURFACE AND THE FLUID-FOIL SECTION LOCATED AT THE TIP OF THE LIFTING SURFACE.

INTERJACENT SECTION
NACA 2315 AIRFOIL
MEAN CAMBER = 2.0%
THICK. RATIO = 15.0%

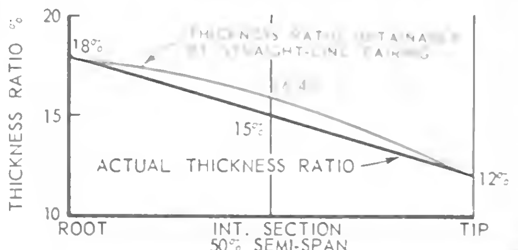
TIP
NACA 4312 SE
MEAN CAMBER = 4.0%
THICK. RATIO = 12.0%



SPANWISE MEAN CAMBER DISTRIBUTION



SPANWISE THICKNESS RATIO DISTRIBUTI



edge radius increased in successive steps [R. 899] from the tip inboard, thus increasing the airfoil camber toward the tip. The article states that the result of this change was that [R. 899]

> "the leading edge at the tip remained unstalled throughout"

and that

> "* * * the stall of the wing started along the trailing edge near the midpoint of the semi-span and proceeded gradually in all directions * * * the stall became smooth and more controllable"

Here we have tip stall prevention, with the stall initiating at the trailing edge near the midpoint of the semi-span and proceeding gradually in all directions, in a wing composed of different airfoil sections which resulted in camber deviation from linear fairing.

The Curtiss-Wright, Glenn L. Martin and Vultee airplanes, hereinafter more fully explained, achieved stall initiation in the mid-span of the wing and spreading inboard and outboard with wings having camber and thickness variations which resulted in deviation from that derived from linear fairing exactly as described in the patent.

Stall which initiated near semi-mid-span and spread inboard and outboard was abundantly old in the art and thus was not a distinguishable attribute to the patent in suit.

There is no competent evidence in this record that the remedy for any airplane with objectionable tip stall was not known and available. The evidence is to the effect that when, in the course of the development of a par-

ticular airplane design, tip stall was manifested in the preliminary procedure, such as wind-tunnel tests, it was promptly eliminated as a matter of engineering routine by variations of camber and thickness according to the teachings in the literature and by so doing moved the initial stall point inwardly of the tip, as occurred in connection with the Glenn L. Martin and Curtiss-Wright airplanes hereinafter discussed. There was no unsolved problem in tip stall prevention.

It is therefore plain that the alleged invention of the patent in suit does not provide any "novel stall characteristic."

(b) The "Pinguino" Sailplane.

Garbell in 1936 and 1937 in Italy helped design, build, and fly a sailplane (*i. e.,* a "glider") named the "Pinguino." He admitted that the *"Pinguino" embodied the principles of the patent in suit* [R. 239-241]. He admitted that some of the flight and wind-tunnel tests referred to in the patent in suit as demonstrating "convincingly that each of the objects of this invention has been fully achieved" [Col. 10, lines 50-58] were those of the "Pinguino" [R. 162, 165]. He admitted [R. 180-181] that the "Pinguino" wing construction was fully described in a 1938 publication, Defendants' Exhibit G [R. 791]. It is also described in other prior-art publications [R. 943, 952, 961, 964].

Garbell also admitted that the "Pinguino" wing had four control sections providing camber changes between root and tip which were non-lineal, the purpose of which was to move the point of stall inception inboardly from the tip [R. 240-241, 479-480]. The camber and thickness

THE "PINGUINO" G.P.I. SAILPLANE

INTERJACENT SECTION NO. 2
G535 AIRFOIL
MEAN CAMBER = 5.5%
THICK. RATIO = 16%

TIP
NACA 23012 AIRFOIL
MEAN CAMBER = 2.0%
THICK. RATIO = 12%

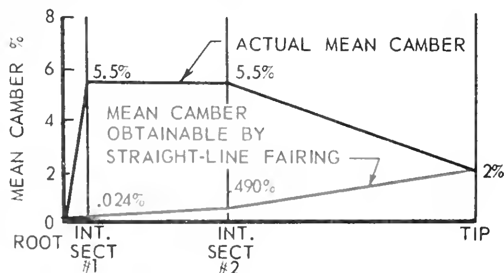
INTERJACENT SECTION NO. I
G535 AIRFOIL
MEAN CAMBER = 5.5%
THICK. RATIO = 16%

ROOT
NACA 0015 AIRFOIL
MEAN CAMBER = 0%
THICK. RATIO = 15%

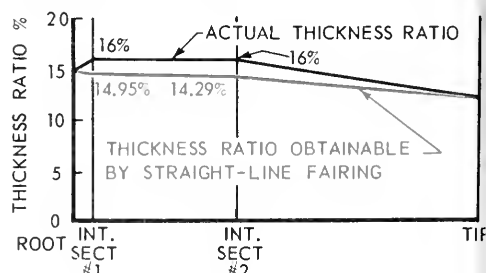
SECTION OBTAINABLE BY
STRAIGHT-LINE FAIRING
FROM ROOT TO TIP
MEAN CAMBER = .490%
THICK. RATIO = 14.29%

SECTION OBTAINABLE BY
STRAIGHT-LINE FAIRING
FROM ROOT TO TIP
MEAN CAMBER = .024%
THICK. RATIO = 14.95%

SPANWISE MEAN CAMBER DISTRIBUTION



SPANWISE THICKNESS RATIO DISTRIBUT



geometry of the "Pinguino" wing are shown in accompanying Plate VI.

Plaintiffs are in this dilemma: If they rely upon the "Pinguino" wing as conception or reduction to practice of the alleged invention of the patent in suit, then the patent in suit is plainly invalid as being fully described in such printed publications in evidence more than one year prior to the application for the patent in suit; on the other hand, if they do not rely upon the "Pinguino" as such conception, there is nothing to support their contention that Garbell "made" the invention prior to his employment by Consolidated.

It now appears that a second patent, No. 2,498,262, was obtained by Garbell after this suit was filed as a continuation-in-part or, in effect, as an original part, of the patent in suit, and therefore we ask this Court to take judicial notice of it. A copy of this second Garbell patent is included as Appendix C at the end of this brief.

Garbell in this continuation patent claims the *identical* camber progression disclosed in the "Pinguino." Each claim specifies that "the mean-line camber at the interjacent section *exceeds* the mean-line camber of the more highly cambered tip section," as it was in the "Pinguino." The second patent asserts stall characteristics which are *identical* with those of the wing of the patent in suit (compare the stall pattern diagrams, Fig. 3 of the patent in suit and Figure 3 of the second Garbell patent). Thus the wings in the "Pinguino" as described in the publications of 1937-8, the patent in suit, and the second patent, produce identical stall results, and constitute a statutory bar against a patent claim in 1946, such as those in patent in suit, for achieving the same stall results.

N. A. C. A. 2309 airfoil at the tip, or a constant 2% camber from root to tip, with thickness decreasing linearly from 15% at the root to 9% at the tip.* The Lombard article states [R. 899]:

> "The stall of the wing was observed in flight * * * to start at the leading edge near the right wing tip and progress rapidly to cover the whole tip portion * * *"

To correct this unsatisfactory stall, the wing was then modified by building up the tip to form a new airfoil designated the CW-19, having an increased camber of 3.4% [R. 899, 900, 998] and fairing this linearly into the original section at Section rib 4 (about 30% of the semi-span) [R. 386]. The wing had minimum camber at the root, greatest camber at the tip, and an interjacent section at the rib 4 having camber at variance with (less than) that obtainable with straight-line fairing.

This modification completely corrected the stall difficulty with the Model 19 [R. 381] as shown by flight tests [R. 384]. According to Lombard [R. 899]:

> "The wool tufts showed that the stall of this wing started along the trailing edge near the mid-point of the semi-span and proceeded gradually in all directions. * * * the whole character of the stall became smooth, more controllable."

In 1939, a new version of the Model 19 was designed and built by Curtiss-Wright, designated the Model 23. In the wing of this airplane, the airfoil sections at rib 4 and

---

*In the NACA airfoil designations, the first digit represents the mean camber in per cent, and the last two digits represent the thickness in per cent, thus NACA 2309 has 2% camber, and 09% thickness.

THE CURTISS-WRIGHT MODELS 21B & 23 AIRPLANES APPLIED TO GARBELL PATENT IN SUIT

CLAIM 12 A LIFTING SURFACE WITH THREE OR MORE CONTROLLED FLUID-FOIL SECTIONS, IN WHICH

THE FIRST SECTION WITH THE SMALLEST MEAN-LINE CAMBER AND GREATEST THICKNESS RATIO IS LOCATED AT THE ROOT,

THE SECOND SECTION WITH THE GREATEST MEAN-LINE CAMBER AND SMALLEST THICKNESS RATIO IS LOCATED AT THE FLUID-DYNAMICALLY EFFECTIVE TIP,

AND THE THIRD OR ADDITIONAL FLUID-FOIL SECTIONS ARE LOCATED AT STATIONS INTERJACENT BETWEEN THE ROOT AND THE TIP, WHEREIN THE VALUES OF THE THICKNESS RATIO OF THE INTERJACENT FLUID-FOIL SECTIONS ARE SMALLER THAN THE VALUES OF THE THICKNESS RATIO OBTAINABLE AT THE RESPECTIVE SPANWISE STATIONS BY MEANS OF STRAIGHT-LINE FAIRING BETWEEN THE FLUID-FOIL SECTION LOCATED AT THE ROOT OF THE LIFTING SURFACE AND THE FLUID-FOIL SECTION LOCATED AT THE TIP OF THE LIFTING SURFACE.

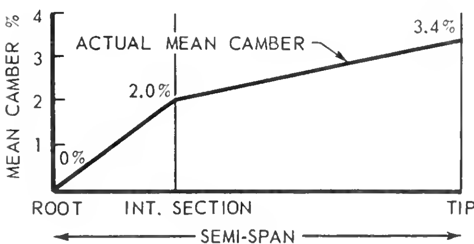
INTERJACENT SECTION
NACA 2314 AIRFOIL
MEAN CAMBER = 2.0%
THICK. RATIO = 14.0%

TIP
CW19 AIRFOIL
MEAN CAMBER = 3.4%
THICK. RATIO = 10.0%

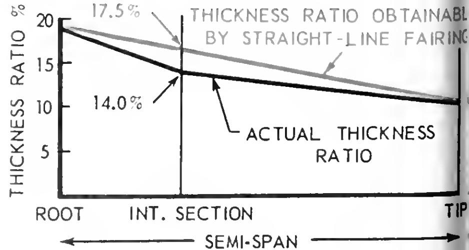
ROOT
CW 23 AIRFOIL
MEAN CAMBER = 0%
THICK. RATIO = 19.0%

AIRFOIL SECTION OBTAINABLE BY STRAIGHT-LINE FAIRING FROM ROOT TO TIP
THICKNESS RATIO = 17.5%

SPANWISE MEAN CAMBER DISTRIBUTION



SPANWISE THICKNESS RATIO DISTRIBUTI



THE CURTISS-WRIGHT MODELS 21B & 23 AIRPLANES APPLIED TO CLAIMS OF GARBELL PATENT IN SUIT

CLAIM I A LIFTING SURFACE WITH THREE OR MORE CONTROLLED FLUID-FOIL SECTIONS, IN WHICH

THE FIRST SECTION WITH THE SMALLEST MEAN-LINE CAMBER IS LOCATED AT THE ROOT,

THE SECOND SECTION WITH THE GREATEST MEAN-LINE CAMBER IS LOCATED AT THE FLUID-DYNAMICALLY EFFECTIVE TIP, AND

THE THIRD OR ADDITIONAL FLUID-FOIL SECTIONS ARE LOCATED AT STATIONS INTERJACENT BETWEEN THE ROOT AND THE TIP, WHEREIN THE VALUES OF THE MEAN-LINE CAMBER OF THE INTERJACENT FLUID-FOIL SECTIONS ARE GREATER

THAN THE VALUES OF THE MEAN-LINE CAMBER OBTAINABLE AT THE RESPECTIVE SPANWISE STATIONS BY MEANS OF STRAIGHT-LINE FAIRING BETWEEN THE FLUID-FOIL SECTION LOCATED AT THE ROOT OF THE LIFTING SURFACE AND THE FLUID-FOIL SECTION LOCATED AT THE TIP OF THE LIFTING SURFACE.

INTERJACENT SECTION
NACA 2314 AIRFOIL
MEAN CAMBER = 2.0%

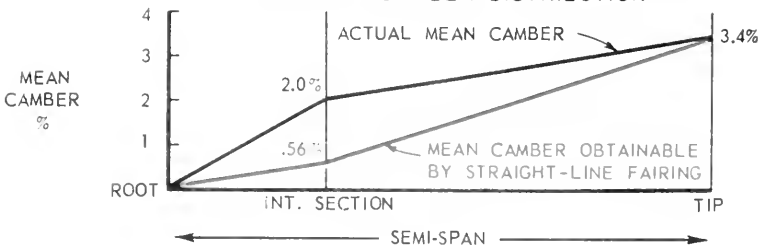
TIP
CW19 AIRFOIL
MEAN CAMBER = 3.4%

ROOT
CW23 AIRFOIL
MEAN CAMBER = 0%

ALSO SEE CLAIMS IN SUIT #2 & 3

AIRFOIL SECTION OBTAINABLE BY STRAIGHT-LINE FAIRING FROM ROOT TO TIP-
MEAN CAMBER =.56%

SPANWISE CAMBER DISTRIBUTION



the tip were retained from the Model 19 design, but the root section was modified to a new section designated the CW-23 having 0% camber and 19% thickness. The relationship of the resulting wing to the construction and claims of the patent in suit is shown in accompanying Plates VII and VIII.

One Model 23 airplane was built [R. 379], and in 1940-41 twenty-four airplanes designated Model 21B having the identical wing geometry as the Model 23 were built and delivered to the Dutch government [DX-QQQ, and R. 383].

As shown on Plates VII and VIII, and established by DX-NNN [981] and the testimony of Oldendorph [R. 380-382], the wing of the Models 23 and 21B airplane had the smallest mean-line camber at the root, the greatest mean-line camber at the tip, and an interjacent station at about 30% semi-span having a camber at variance with and greater than the camber obtainable by straight-line fairing. The root section had the greatest thickness, the tip the least, and the thickness at the interjacent section was less than that obtainable by linear fairing.

Plates VII and VIII show that there is no substantial difference between the structure of the claims in suit and the Curtiss-Wright airplanes, Models 21B and 23, the same variances of camber and thickness ratios with straight-line fairing existing. The inboard stall which Garbell asserts for his patent is fully described in the publication [DX-VV]. These airplanes constituted an actual accomplishment of this stall, while the Garbell patent was, at most, a prediction. The references to the polygon enveloping the curve representing the spanwise distribution specified in claims 2, 3, 5 and 6 do not define

novelty in structure [R. 333] and were inherent in the Curtiss-Wright wing designs.

We respectfully submit that the Curtiss-Wright airplanes embodied a wing construction which anticipates the claims in suit in every substantial respect.

(d) The Glenn L. Martin Co. Prior Airplanes—Models B-26 and PBM.

Also a direct and complete anticipation of the claims in suit is the B-26 airplane, extensively made and sold by the Glenn L. Martin Company, of Maryland. About 5,200 of the B-26 airplanes were made and sold by the Martin Company during the period 1941 to 1945 [R. 501].

The geometry of the wing of the B-26 airplane is illustrated in accompanying Plate IX, in which claim 2 of the patent in suit is applied thereto. Every other claim in suit may be applied equally well. In Plate IX, the camber and thickness ratio values are in accordance with Martin Co. chart appearing in its Engineering Report No. 1484 [R. 845].

In the initial design of the B-26 by the Martin Company, it was anticipated that the proposed wing would have an undesirable tip stall. This is plainly shown by the Martin Company Engineering Report No. 1326, Defendants' Exhibit EE, and was confirmed by the witness Trimble, chief aerodynamics engineer of the Martin Company [R. 508]. To correct this anticipated tip stall defect, the wing of the wind-tunnel model of the B-26 was modified by increasing the camber of the tip section and fairing this increased camber into an interjacent station. This is clearly described in Report 1326, and was confirmed by the witnesses Trimble [R. 508-509] and Clark [R. 580-585]. As shown by Report 1326, a number of

THE GLENN L. MARTIN MODEL B26 AIRPLANE APPLIED TO CLAIMS OF GARBELL PATENT IN SUIT

AIM 2 A LIFTING SURFACE WITH THREE OR MORE CONTROLLED FLUID-FOIL SECTIONS, IN WHICH

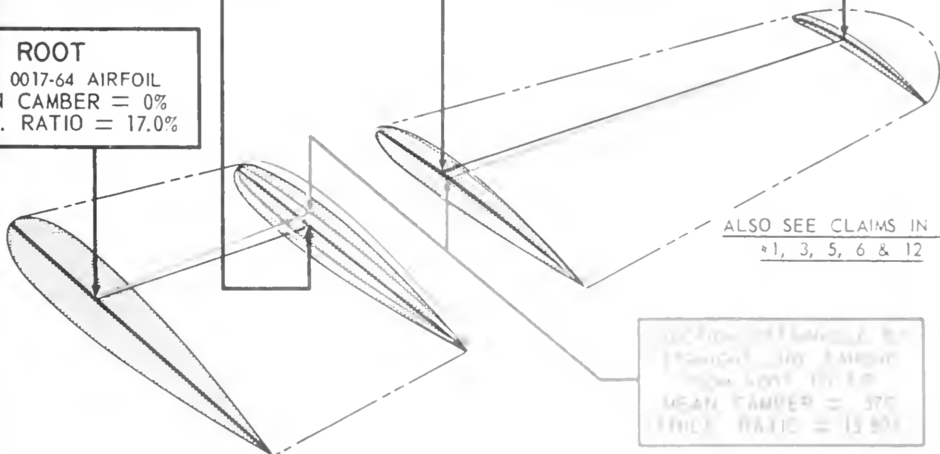
THE FIRST SECTION WITH THE SMALLEST MEAN-LINE CAMBER IS LOCATED AT THE ROOT,

THE SECOND SECTION WITH THE GREATEST MEAN-LINE CAMBER IS LOCATED AT THE FLUID-DYNAMICALLY EFFECTIVE TIP,

AND THE THIRD OR ADDITIONAL FLUID-FOIL SECTIONS ARE LOCATED AT STATIONS INTERJACENT BETWEEN THE ROOT AND THE TIP, WHEREIN THE VALUES OF THE MEAN-LINE CAMBER OF THE INTERJACENT FLUID-FOIL SECTIONS ARE AT VARIANCE WITH THE VALUES OF THE MEAN-LINE CAMBER OBTAINABLE AT THE RESPECTIVE SPANWISE STATIONS BY MEANS OF STRAIGHT-LINE FAIRING BETWEEN THE FLUID-FOIL SECTION LOCATED AT THE ROOT OF THE LIFTING SURFACE AND THE FLUID-FOIL SECTION LOCATED AT THE TIP OF THE LIFTING SURFACE,

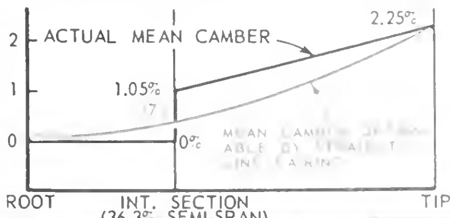
SAID THREE OR MORE CONTROLLED FLUID-FOIL SECTIONS HAVING VALUES OF THE MEAN-LINE CAMBER SELECTED IN SUCH MANNER THAT THE RESULTING SPANWISE DISTRIBUTION OF MAXIMUM ATTAINABLE SECTION LIFT COEFFICIENTS OF THE THREE OR MORE CONTROLLED SECTIONS FORMS A CURVILINEAR POLYGON ENVELOPING A CURVE REPRESENTING THE SPANWISE DISTRIBUTION OF SECTION LIFT COEFFICIENTS FOR A GIVEN PLANFORM ACTUALLY PREVAILING AT THE MAXIMUM ATTAINABLE LIFT COEFFICIENT OF THE LIFTING SURFACE.

REFER TRIMBLE DEPOSITION - R.515

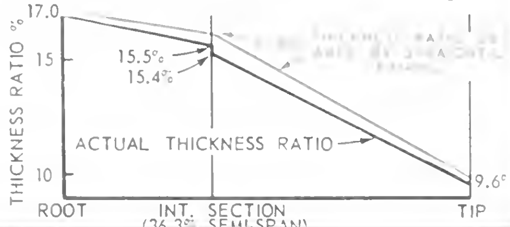


ALSO SEE CLAIMS IN SUIT *1, 3, 5, 6 & 12

ANWISE MEAN CAMBER DISTRIBUTION



SPANWISE THICKNESS RATIO DISTRIBUTI



different designs were wind-tunnel tested, and a wing with a "drooped nose" (*i. e.*, increased camber) at the tip, defined as the "No. 2, Leading Edge," was adopted for the final design of the B-26 airplane [R. 509]. The B-26 series of airplanes as actually made and sold incorporated this construction [R. 509, 519, 582-583].

This change in construction, embodied in the B-26 airplanes as they were actually made and sold, provided a wing such that the "airfoils between the root and the tip are not the result of straight-line fairing between root and tip" [R. 506], but, in fact, the camber was greater than that obtainable by straight-line fairing [R. 509, 584]. The specific construction of the B-26 wing is detailed in the evidence by Reports No. 1326 [DX-EE] and No. 1484 [DX-FF], both of which were fully identified, confirmed, and elaborated upon by the witnesses Trimble and Clark. Trimble actually wrote Report No. 1326 [R. 508].

As a result of the wing change in the B-26, the point of stall inception was moved inwardly from the tip [the point "A" on p. 10 of DX-EE], to about the middle of the semi-span [the point "B" on p. 10, DX-EE], which was the very purpose of the change [R. 510, 538-539, 552, 572-573].

These airplanes actually produced the stall inboard of the tip and approximately at mid-semi-span, suppressed tip stall and achieved in substance the result asserted for the patent by deviation of camber and thickness from the values obtained by straight-line fairing. Thus, the B-26 airplane had substantially the same elements, which produced substantially the same result in substantially the same way as the patent in suit, and the claims in suit are plainly anticipated thereby and invalid.

That B-26 airplanes were actually made and sold in quantity between 1940 and 1945 cannot be doubted from the evidence, which shows purchase contracts [R. 821], packing orders [R. 827], a delivery receipt [R. 828], a data sheet [R. 833], and photographs [R. 846], corroborated by the testimony of Trimble, Clark, and Boardley (contract administrator).

The Martin B-26 and PBM-3 aircraft were established in the evidence entirely by depositions and by documentary exhibits. The District Court neither heard nor saw any of the witnesses to such prior uses, and therefore enjoyed no superiority over this Court in the opportunity to evaluate the evidence with regard thereto. Under such circumstances, this Court is free to disregard the Findings of Fact in so far as they relate to the B-26 prior-use airplane. (*See: Equitable Life Assurance Society v. Irelan,* 123 F. 2d 462 (C. C. A. 9th, 1941); *Himmel Bros. Co. v. Serrick Corp.,* 122 F. 2d 740 (C. C. A. 7th, 1941).)

The Glenn L. Martin Company built and extensively sold another airplane, the PBM-3, in which tip stall was avoided by the use of "three control-sections" in the wing.

The PBM-3 airplanes had a gull type of wing, and the section intermediate the "break" and the tip had the same modification for increased camber as in the B-26 model [R. 520] for the same reasons and with like result in stall characteristics. The camber of the tip was increased by changing to the section shown in Figure 4 [R. 857] and fairing linearly to the gull break. The camber at the intermediate station between the root section and the tip, deviated from the camber obtainable with straight fairing [R. 525, 587]. This change accomplished the result of shifting the incipient stall point inboard from the tip

THE GLENN L. MARTIN PBM AIRPLANE

APPLIED TO CLAIMS OF GARBELL PATENT IN SUIT

CLAIM 2 A LIFTING SURFACE WITH THREE OR MORE CONTROLLED FLUID-FOIL SECTIONS, IN WHICH

THE FIRST SECTION WITH THE SMALLEST MEAN-LINE CAMBER IS LOCATED AT THE ROOT,

THE SECOND SECTION WITH THE GREATEST MEAN-LINE CAMBER IS LOCATED AT THE FLUID-DYNAMICALLY EFFECTIVE TIP,

AND THE THIRD OR ADDITIONAL FLUID-FOIL SECTIONS ARE LOCATED AT STATIONS INTERJACENT BETWEEN THE ROOT AND THE TIP, WHEREIN THE VALUES OF THE MEAN-LINE CAMBER OF THE INTERJACENT FLUID-FOIL SECTIONS ARE AT VARIANCE WITH THE VALUES OF THE MEAN-LINE CAMBER OBTAINABLE AT THE RESPECTIVE SPANWISE STATIONS BY MEANS OF STRAIGHT-LINE FAIRING BETWEEN THE FLUID-FOIL SECTION LOCATED AT THE ROOT OF THE LIFTING SURFACE AND THE FLUID-FOIL SECTION LOCATED AT THE TIP OF THE LIFTING SURFACE,

SAID THREE OR MORE CONTROLLED FLUID-FOIL SECTIONS HAVING VALUES OF THE MEAN-LINE CAMBER SELECTED IN SUCH MANNER THAT THE RESULTING SPANWISE DISTRIBUTION OF MAXIMUM ATTAINABLE SECTION LIFT COEFFICIENTS OF THE THREE OR MORE CONTROLLED SECTIONS FORMS A CURVILINEAR POLYGON ENVELOPING A CURVE REPRESENTING THE SPANWISE DISTRIBUTION OF SECTION LIFT COEFFICIENTS FOR A GIVEN PLANFORM ACTUALLY PREVAILING AT THE MAXIMUM ATTAINABLE LIFT COEFFICIENT OF THE LIFTING SURFACE.

REFER TRIMBLE DEPOSITION - R.515

INTERJACENT SECTION
NACA 23019.024 AIRFOIL
MEAN CAMBER = 2.0%

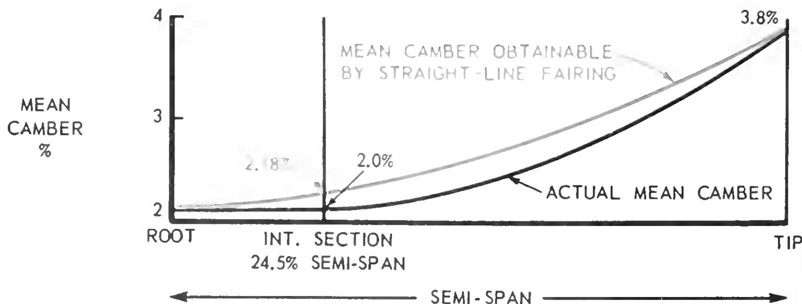
TIP
NACA 23010 MOD. AIRF
MEAN CAMBER = 3.8
THICK. RATIO = 10%

ROOT
NACA 23020 AIRFOIL
MEAN CAMBER = 2.0%
THICK. RATIO = 20%

SECTION OBTAINABLE BY STRAIGHT-LINE FAIRING FROM ROOT TO TIP
MEAN CAMBER = 2.18%

ALSO SEE CLAIMS IN SUIT #1, & 3

SPANWISE MEAN CAMBER DISTRIBUTION



[R. 589]. This wing had stall characteristics sufficiently satisfactory for use in the 1,300 PBM-3 airplanes that were made and flown.

The Martin PBM-3 airplanes have been established by purchase contract [R. 823]; page W-3 from data book DX-NN [R. 861]; drawing DX-RR [R. 865]; photographs of airplane in flight, DX-QQ [R. 865]; report 1339, DX-II [R. 849], and the testimony of Trimble [R. 519-526], and Clark [R. 586-589] concerning the details of these airplanes, and of Boardley about sales. About 1,300 of these airplanes were built and flown [R. 503-505] during the period 1941-1945.

Here again, as routine engineering procedure, the Martin Company, when confronted with tip stall in an airplane, modified the wing by increasing the camber at the tip, to provide an interjacent section having a mean-line camber "at variance" with linear fairing, to in turn move the point of stall inception inboardly on the wing and provide satisfactory stall characteristics.

On accompanying Plate X, claim 2 of the patent in suit is applied to the Model PBM. There is no difference in the means (camber and thickness ratio) specified, for producing the same result (inboard stall) as the patent. This result was actually achieved in the Martin airplanes.

The proofs of the Martin Models B-26 and PBM have not been challenged by plaintiff. The opinion and Findings of Fact of the District Court do not mention either of these airplanes.

We assert that these Martin airplanes are complete anticipations of the wing construction specified in the claims of the patent in suit.

(e) The Vultee "Vengeance" Airplane.

Another prior-art aircraft embodying the principles of the patent in suit was the "Vengeance" airplane designed and manufactured by Vultee Aircraft, Inc. About 1500 of such aircraft were built and sold to the Army Air Force; contracts dated September 22, 1942, and December 17, 1942, for 400 and 2330, respectively, of such aircraft being in evidence in Defendants' Exhibit K [R. 805, 330-331], and deliveries thereof started in 1942 or 1943 [R. 333].

The "Vengeance" had a wing having three control sections, the root section and the interjacent section having the smallest mean-line camber and the greatest thickness ratio, and the tip section having the greatest mean-line camber and the smallest thickness ratio, the interjacent section having a mean-line camber greater than that obtainable by straight-line fairing and a thickness ratio at variance with that obtainable by straight-line fairing [R. 332-333, 335-341]. The geometry of the "Vengeance" wing is graphically illustrated in Defendants' Exhibit LLL [R. 974], the graph of which is reproduced in accompanying Plate XI.

The root section had the least camber (1.4%), the tip had the greatest camber (2.0%) and the interjacent sta-

THE VULTEE MODEL V72 AIRPLANE

PPLIED AGAINST CLAIMS OF GARBELL PATENT IN SUIT

5 A LIFTING SURFACE WITH THREE OR MORE CONTROLLED FLUID-FOIL SECTIONS, IN WHICH

THE FIRST SECTION WITH THE SMALLEST MEAN-LINE CAMBER AND GREATEST THICKNESS RATIO IS LOCATED AT THE ROOT,

THE SECOND SECTION WITH THE GREATEST MEAN-LINE CAMBER AND SMALLEST THICKNESS RATIO IS LOCATED AT THE FLUID-DYNAMICALLY EFFECTIVE TIP,

AND THE THIRD OR ADDITIONAL FLUID-FOIL SECTIONS ARE LOCATED AT STATIONS INTERJACENT BETWEEN THE ROOT AND THE TIP, WHEREIN THE VALUES OF THE THICKNESS RATIO OF THE INTERJACENT FLUID-FOIL SECTIONS ARE AT VARIANCE WITH THE VALUES OF THE THICKNESS RATIO OBTAINABLE AT THE RESPECTIVE SPANWISE STATIONS BY MEANS OF STRAIGHT-LINE FAIRING BETWEEN THE FLUID-FOIL SECTION LOCATED AT THE ROOT OF THE LIFTING SURFACE AND THE FLUID-FOIL SECTION LOCATED AT THE TIP OF THE LIFTING SURFACE,

SAID THREE OR MORE CONTROLLED FLUID-FOIL SECTIONS HAVING VALUES OF THE THICKNESS RATIO SELECTED IN SUCH MANNER THAT THE RESULTING SPANWISE DISTRIBUTION OF MAXIMUM ATTAINABLE SECTION LIFT COEFFICIENTS OF THE THREE OR MORE CONTROLLED SECTIONS FORMS A CURVILINEAR POLYGON ENVELOPING A CURVE REPRESENTING THE SPANWISE DISTRIBUTION OF SECTION LIFT COEFFICIENTS FOR A GIVEN PLANFORM ACTUALLY PREVAILING AT THE MAXIMUM ATTAINABLE LIFT COEFFICIENT OF THE LIFTING SURFACE.

REFER SCHICK, R.333; ALSO PX29

TIP
NACA 20205-64 AIRFOIL
MEAN CAMBER = 2.0%
THICK. RATIO = 9.0%

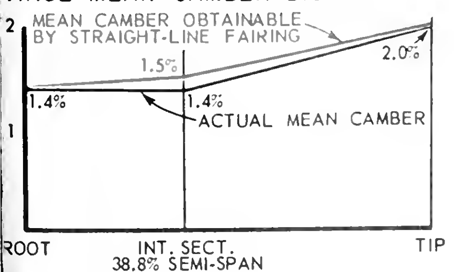
INTERJACENT SECTION
NACA 14516-64 AIRFOIL
MEAN CAMBER = 1.4%
THICK. RATIO = 16.0%

ROOT
A 14516-64 AIRFOIL
N CAMBER = 1.4%
K. RATIO = 16.0%

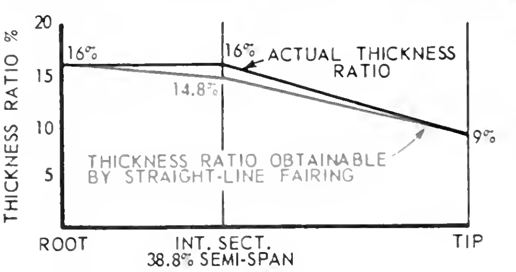
AIRFOIL SECTION OBTAINABLE BY STRAIGHT-LINE FAIRING FROM ROOT TO TIP
MEAN CAMBER = 1.5%
THICK. RATIO = 14.8%

SEE CLAIMS
T #2, 3, & 6

NWISE MEAN CAMBER DISTRIBUTION



SPANWISE THICKNESS RATIO DISTRIBUTION



tion had 1.4% camber which is less than and at variance with that obtainable by straight-line fairing from root to tip. The thickness ratio was 16.0% at the root, 16% at the break or interjacent station, and 9.0% at the tip, as charted in Exhibit LLL [R. 974], and identified and explained by Shick [R. 376]. The thickness ratio at the break was greater than and at variance with that obtainable by straight-line fairing. The interjacent station was located at approximately 40% of the semi-span [R. 819].

This is a wing of the type described in the statement of the patent in suit [Col. 4, lines 51 to 56], which points out an exemplification for achieving the asserted results when—

> "The values of the mean-line camber of the interjacent sections neither exceed the mean-line camber of the tip section nor fall below the mean-line camber of the root section."

Shick actually participated in the flight and wind-tunnel tests of the Vultee airplanes, and, describing their stall characteristics, said [R. 332]:

> "A. Stall characteristics started with an initial stall at approximately the mid-control station, and progressed gradually both spanwise outboard and inboard, in a gradual manner as the stall progressed. It was a mild section stall, mid-section stall. I should say that was verified in flight as in the wind-tunnel tests."

These airplanes embodied the particular spanwise distribution of lift coefficients referred to in the claims of the patent. Shick said [R. 333]:

> "Q. In the Vengeance airplane did the fluidfoil sections have mean line camber that resulted in spanwise distribution of maximum attainable lift coefficients of the three or more control sections forming a curvilinear polygon enveloping a curve representing the spanwise distribution of section lift coefficients? A. It did. It formed a curvilinear polygon.
>
> Q. * * * Does any airfoil which has three-control stations, with the mean line camber at the mid-station at variance with the other two, result in this curvilinear polygon involving a curve representing the spanwise distribution of section lift coefficients? A. Yes sir, it does."

Shick clarified this statement by Plaintiffs' Exhibit 29.

The Vultee airplanes actually achieved these stall characteristics by means of spanwise distribution of camber and thickness. Garbell's patent application was based on theory. The former was an accomplishment and the latter was a prediction.

The opinion of the District Court and Findings of Fact fail to mention the Vultee airplanes, notwithstanding the unchallenged evidence that the wings of that airplane produced a stall which has its inception over an area inboard of the tip and of the lateral control surface, and contained the camber and thickness variations exemplified in the patent.

POINT SIX.

The Claims in Suit Are Fatally Indefinite.

Claim 1 in suit distinguishes from the prior art, if it distinguishes at all, merely in the inclusion of an interjacent fluid-foil section having a mean-line camber "greater" than that obtainable by straight-line fairing. If there be any novelty, it is at this exact point, because the balance of the claim merely defines a conventional wing (p. 9, *supra*). Yet no hint is given either in the claim or in the specification as to *how much* "greater" it may or must be. We suggest that claim 1 is fatally indefinite at the only possible point of novelty, and that this renders the claim invalid under the law. (*See: General Electric Co. v. Wabash Appliance Corp.*, 304 U. S. 364, 58 S. Ct. 899, 82 L. Ed. 1402 (1938); *United Carbon Co. v. Binney & Smith Co.*, 317 U. S. 228, 63 S. Ct. 165, 87 L. Ed. 232 (1942).)

Claims 2 and 3 are subject to the same vice, but in a more exaggerated way. These claims define the mean-line camber of the interjacent section merely as "at variance" with that obtainable by straight-line fairing. Although this is the only conceivable point of novelty in these claims, they fail to state *what* or *how much,* this "variance" is to be.

Claims 5 and 6 do not define the mean-line camber of the interjacent section at all, and if this is in fact essential to the alleged invention these claims are fatally incomplete. Furthermore, while these claims define the thickness ratio of the interjacent section as "at variance" with that obtainable by straight-line fairing, they do not define *what* or *how much* this "variance" may or must be, nor does the specification do so.

Similarly, claim 12 fails to define the mean-line camber of the interjacent section, and defines its thickness ratio merely as "smaller" than that obtainable by straight-line fairing. How much smaller is left wholly in doubt, and there is nothing in the specification to assist in determining this.

We therefore submit that Findings XXII, XXIV and XXIX are clearly erroneous, and that all of the claims in suit should be held invalid for failing to "particularly point out and distinctly claim" the alleged invention as required by Section 33, Title 35, U. S. C. A.

POINT SEVEN.

Defendants' Airplanes Do Not Produce the Type of Stall Described in the Patent in Suit and Do Not Infringe.

(a) The Model 240 Airplane.

The wing illustrated and described in the Garbell patent is bare and devoid of the environmental structure or concomitants of the actual wing of a multi-engine airplane, such as fuselage, engine nacelles, control surfaces and a tail structure or empennage. The interjacent station with camber variation is located at 55% [Col. 8, line 58] of the semi-span from the root with no washout, or at 60% of the semi-span [Col. 8, line 71] from the root with 0.5 aerodynamic washout. The spanwise relation of the inner ends of the ailerons and the tail surfaces of the airplane to the interjacent station are not illustrated or described.

The wing of defendants' accused Model 240 Convair airplane has an engine nacelle and an aerodynamic washout or twist of 1° 12′ [R. 1005]. There is a very slight

deviation in camber and thickness from linear fairing at the 30.7% station from the root, which is referred to as a "break." The upper and lower surfaces of the wing, for an area of approximately 5 feet spanwise, are enclosed in the nacelle and are not in contact with the air stream during flight. Fillets between the root and the fuselage were added according to the flight reports [PX-35], and modifications to the fillet at the after end of the nacelle and to the control system [R. 418] were made without changes in the wing sections, *per se*. These were made to correct unfavorable stall characteristics which were evident in the first model of the 240 series, and resulted in the ultimate stall characteristics of the accused airplanes. In agreement that these additions and modifications are important factors in the aerodynamic or stall characteristics and results are Garbell [R. 272] and the engineers Ward [R. 419] and Trimble [R. 570-574].

(b) Stall Characteristics or Operation and Results.

It is elementary that substantial identity in operation and result must be established to prove infringement, as well as identity in means. In the instant case, that means identity in the particular stall characteristics produced by the wing of the patent and the wing of defendants' Model 240 airplane. (*See: Sewall v. Jones,* 91 U. S. 171, 23 L. Ed. 275; *Riverside Heights Orange Growers Assn. v. Stabler,* 240 Fed. 703 (C. A. 9).)

In an airplane, the stall characteristics reflect the mode of operation and results of the wing.

In the patent, the interjacent control station is described as being located 55% of the semi-span outboard from the root [Col. 8, line 58]. The stall inception and develop-

ment or spread is illustrated in Figure 3 and described in Column 5, lines 39-43. The stall inception is in the area *12,* and spreads progressively inwardly and outboardly to the areas *13, 14, 15* and *16* from the inception area *12,* at angles of attack greater than that at which stall inception occurs. The prevalent development or spread *after* inception is inboard, and it is this spread which Garbell described for producing the tail shake for a stall warning [Col. 8, line 51]. For this operation and result, the area *12* of stall inception must be outward (spanwise) of the outer end of the tail of the airplane and the root or fuselage, as is indicated in Figure 3, so that the air flow aft from the wing to the tail will be retained during the stall inception to prevent tail shake. The development or spread from the inception area *12* must be inward toward the root as the angle of attack is increased in approaching a full stall. The spread of the stall must be toward the root area in front of the tail to produce the delayed tail shake. While the spread from inception area *12* is predominantly inward, it also develops outwardly therefrom in the results illustrated and described. Those are the stall characteristics or operation and result described in the patent in suit.

In describing the stall of the wing of the patent in suit, Garbell said [R. 183]:

> "In effect, it was the idea of having stall inception that is the first separation of the air flow over some section of the wing, *out*side of the tail. Somewhere, let's say in the vicinity of the mid-span or somewhat inboard of it, so that the *first* separation would *not* produce a tail shake; and then design the wing so that stall separation would move rapidly inboard and less rapidly *out*board, so that it would reach the root

> within a few degrees of angle of incidence so that there would be a shake at the tail before the lift was completely lost." (Italics added.)

For that result, the stall inception area must be *out*ward spanwise from the tail and spaced spanwise from the root and progress inward or spread toward the root. There must be an initially non-stalled area near the root in order to avoid the initial tail shake.

In describing "root" stall and differentiating it from the stall of the patent, Garbell said [R. 179]:

> "Now, this proposed root stall is to start on the wing near the wing root, or at the wing root, and is to develop quite deeply in the wing root panel with a very slow and gradual progression outward as the angle of attack increases * * * The first consequence of a root stall is a vigorous tail shake."

The essential difference in result asserted by Garbell between the old "root" stall, and that in the patent, is that "root" stall produces a tail shake at the *in*ception while the wing of the patent does not produce it at inception but defers it until just before the angle of attack is increased to the full stall point.

The District Court held [R. 38] that Garbell's patent teaches a wing "having a stall which has its inception over a large area inboard of the lateral control surface (aileron) that spreads inwardly." That is not in agreement with the illustration and description in the patent, where the area of inception indicated at *12* is not "over a large area," but a very restricted area between the outer

end of the tail (not shown) and the inner end of the aileron (not shown), if we assume that area *12* is located to avoid an initial tail shake. It is the spread which may be over a large area, but not the inception. Likewise, Findings VII, XI and XII which refer to a stall "which had its inception over a large inboard area" are not in accord with the small inception area (12) illustrated and described. Likewise, Findings XIX and XX, which state that "inducing a stall" (XIX) or "inducing the initial stall" (XX) in an interjacent surface or section "over a wide area" are not correctly descriptive for comparison of the patent and the prior art. Stall inception over a large area is contradictory of the patent because a restricted inception area (12) is essential to prevent the initial tail shake.

The only testimony offered by plaintiffs on the question of infringement was that of Garbell. On *prima facie,* he merely pointed [R. 222] to the camber and thickness variations in the wing of defendants' airplane which are definitely fixed from the evidence [R. 1000]. He did not at all then attempt to explain its stall characteristics.

Ward was completely familiar with the Model 240 airplane and had witnessed flight and wind-tunnel tests with tufts on the wings, as well as the development of the Model 240 from its first design, known as Model 110. Describing the operation and stall demonstrated in flight, he said [R. 419]:

> "Q. Can you tell us from the flight tests where the stall is initiated in the 240 airplanes? A. In

the wing between the nacelle and the fuselage. That is, it is a root stall.

Q. That was based on the tests that you know of? A. Based on flight tests of which I witnessed the tufts of (on) the wings that were installed."

Test and flight reports of the Model 240 are in evidence as Plaintiffs' Exhibit 35, and excerpts are reproduced [R. 110-122, 129-132]. The photographs and reports show that the initial stall occurs suddenly in the root panel on either wing between the nacelle and the fuselage at an angle of attack of approximately 11° [R. 92, 103, 104]. As the angle of attack is increased to 13°, the stall area spreads in the root panel and a secondary stall area is produced outboard of the nacelle. Since the inception area lies in front of the horizontal tail or stabilizer [R. 1000], the tail shake, if there is any, is induced at the inception of the stall for a stall warning [R. 126]. It is a root stall which conforms to Garbell's definition of such [R. 179].

Garbell had no actual knowledge of any tests or operations in flight with defendants' airplane [R. 274]. He did not attempt to point out in the flight reports which defendants furnished to him any support for his testimony.

On rebuttal, after Ward had testified about the root stall in defendants' wing, Garbell said [R. 442]:

"They disclose the stall inception and spread over a large inboard area, both between the ailerons and the nacelles, and the nacelles and root."

That is all he said about stall inception and progression in defendants' wing, and it is misleading. The entire *inception* is between the root and the nacelle and none between the ailerons and the nacelle. The *spread* is outboard to a secondary area outboard of the nacelle. There is no inward progression at any time. Garbell said [R. 179]: "The 'root' stall initially produces a vigorous tail shake." Defendants' wing produces stall inception between the root and nacelle and in front of the tail. Stall inception between the nacelle and root in defendants' wing must produce a tail shake as its first consequence, if it produces any at all, or at any time. That is not the character of the stall the District Court and Garbell ascribed as essential in the patent in suit. There is not one word in the testimony of Garbell or other evidence for plaintiffs that a tail shake is produced, or when it might occur in defendants' wing. Garbell's testimony about defendants' airplane does not mention the operation and result described in the patent—stall inception near the center of the semi-span without tail shake, and inward spread to produce that shake for a deferred stall warning—in defendants' wing. That being the only testimony on this point offered by plaintiffs, we contend that plaintiffs have not proved the identity in mode of operation and result necessary to prove infringement. Stall inception outward of the tail to initially prevent a tail shake until further increase in angle of attack, and subsequent spread of the stall toward the root as described in the patent, is an essential of the mode of operation and result of the patent

and is *not* achieved in defendants' wing. There is no infringement.

When plaintiffs asserted, and as the District Court held, that stall characteristics are essential to the patent, the burden devolved upon plaintiffs to prove that those same characteristics are produced by defendants' wing. Plaintiffs have nowhere adduced any proof or attempted to prove (and could not, because it is not the fact) that the stall inception produced in defendants' wing is where it is in the patent—outboard of the tail—to avoid initial stall warning, or that the spread of the stall in defendants' wing is as it is in the patent—inboard toward the root—to produce a delayed tail shake when a complete loss of lift is approached. Therefore, we contend plaintiffs have not proved infringement.

Infringement is not proved by merely reading a claim upon an accused device; the accused device must be clearly shown to have the *same mode of operation.* (*See: McRoskey v. Braun Mattress Co.*, 107 F. 2d 143 (C. C. A. 9th); *Grant v. Koppl,* 99 F. 2d 106 (C. C. A. 9th).) And the burden of proving such infringement rests squarely upon the plaintiff. (*See: Magnavox Co. v. Hart and Reno,* 73 F. 2d 433, 434 (C. C. A. 9th).)

It will therefore be plain that not only did plaintiffs fail to carry their burden of proving infringement, but the only evidence on the question plainly establishes that the accused Model 240 airplane has a different mode of operation in its stall inception and progression, and does not infringe the patent in suit.

POINT EIGHT.

The District Court Erred in Failing to Grant Defendants' Motion for a New Trial.

Although the granting of a motion for a new trial is clearly within the discretion of a trial court, it is submitted that in the present case the District Court abused its discretion in denying defendants' motion.

Two grounds were and are urged in support of defendants' motion: (a) surprise at the trial, which ordinary prudence could not have guarded against; and (b) newly discovered evidence [R. 65].

At the trial, Garbell testified that prior to his employment by defendant Consolidated he had disclosed the alleged invention of the patent in suit to a Dr. Platt [R. 199-202] and to one Chin [R. 202-207], and, apparently accepting such uncorroborated testimony of a biased witness at face value, the District Court found [Finding XXXVI] that Garbell had "fully and completely disclosed his invention to others prior to his employment by Consolidated" [R. 53]. Platt had died prior to trial, and prior to Garbell's testimony defendants had never heard of Chin [R. 71]. Checking with Chin on Garbell's story after the trial, defendants learned that Garbell's testimony as to such disclosures to Chin were made up out of the whole cloth, and defendants submitted Chin's affidavit [R. 66] which completely refutes Garbell's testimony.

Similarly, Garbell testified at length to disclosures made to and statements made by T. P. Hall and D. A. Hall during his employment by Consolidated. Neither of these men was employed by defendant Consolidated at the time of trial, and Garbell's testimony with regard to such disclosures could not be conveniently checked during the

trial. Their testimony [R. 75-89] was offered in support of defendants' motion to wholly refute this portion of Garbell's testimony, but was refused by the District Court.

In particular, the testimony of said T. P. Hall was offered to correct the erroneous interpretation put by the District Court upon Plaintiffs' Exhibit 25 [Memorandum Decision, R. 40-41] which obviously greatly influenced the decision on the license issues. The surprise here, obviously, came from the District Court's unexpected and erroneous interpretation of this exhibit, as is shown by Hall's proffered testimony [R. 75], which certainly could not have been anticipated by defendants.

Lastly, the District Court found infringement, stating that defendants had offered no evidence to show lack of infringement [Memorandum Decision, R. 38], and making a finding to this effect [Finding XXXI]. We suggest that the error in this lay in the District Court's erroneous impression that plaintiffs, as a matter of law, had carried their burden of proof of infringement even though there was no evidence that defendants' accused airplane had a stall which initiated inboardly of the tip and then progressed inboardly (which the District Court attributed to the patent in suit), and that the burden of proof had shifted to defendants to negative an issue not established by plaintiffs. When this error of law became apparent from the District Court's memorandum decision, the testimony of Matteson and Fox was offered to show conclusively that defendants' accused airplane in fact has a type of stall entirely different from that of the patent in suit. The District Court refused to receive such evidence.

We submit that defendants were wholly surprised by Garbell's unexpected testimony and by the District Court's

erroneous interpretation of the evidence, and that defendants should, in the interests of justice, have been afforded the opportunity to present such proffered testimony. Even though such additional evidence would not have changed the District Court's mind as to the result [R. 496-497], we suggest that such evidence might be more persuasive in this Court.

VI.
Conclusion.

In summary, the pattern of this case is plainly as follows: The patentee Garbell employed the principles of the patent in suit as early as 1937 in his "Pinguino" sailplane; he was employed by defendant Consolidated from August, 1942, until October, 1945, as an aerodynamic engineer, whose duty it was to design and develop airfoils for defendant's airplanes; and during such employment suggested many times to defendant that such "Pinguino" principles be embodied in defendant's airplanes in the process of design. Pursuant to Garbell's suggestion and under his direction, such principles were in fact incorporated in the design of Consolidated's Two-Engine Tailless airplane, its Model 107, its XB-46 Bomber, and its Model 110 (which had the same wing geometry as the accused airplane in suit). During his employment, Garbell made an "official disclosure of invention" to defendant Consolidated of the conception of the patent in suit under his Invention Agreement which provided to defendant an express "free shop-right" thereon. Apart from this express license, defendant Consolidated acquired an implied-in-law license to use the alleged invention, by reason of the fact that Garbell repeatedly suggested its use by Consolidated, which was accepted by defendant pursuant to

his suggestions and with his full approval and co-operation, defendant embodying the suggestion in at least four of its aircraft designs. To now deny to defendant Consolidated the free continued use of that which it bought and paid for through extended experimental work and salary to Garbell, extending over a period of several years, would, we suggest, be an affront to good conscience. During his employ by Consolidated, Garbell never asserted any independent or adverse right to the alleged invention in suit, nor did he ever treat it other than as a development made, perfected, and used for and by defendant. Far from being subject to criticism, we suggest that defendant Consolidated has treated Garbell in the highest of good faith and with great liberality, allowing him to retain title to his alleged invention, whereas it could, legally and morally, have compelled him to assign all of his rights to the defendant. We suggest that the employer-employee relationship is a two-way street, and that an employer is as much to be protected by the courts against an unscrupulous employee as the reverse.

The claims of the patent in suit are obviously invalid as lacking novelty over the prior art, every element of each of the claims being found in the same combination in one or more of the prior-art airplanes or publications.

Even if there is some vestige of novelty in the claims, it does not rise to the dignity of invention, but constitutes mere mechanical skill of the calling. Each of the claims in suit is merely for a collection of old airfoil sections, the novelty, if any, residing in the selection defined thereby. It was old in the art to provide aircraft wings having three or more control sections, in which the mean-line camber increases and the thickness ratio decreases from root to tip, and providing an interjacent section be-

tween root and tip which has a mean-line camber and thickness ratio "at variance" with that obtainable by straight-line fairing, to avoid tip stall by moving the point of stall inception inwardly from the tip. Any variations from such art which plaintiffs can point to in the claims in suit constitute mere changes in form and degree, and do not provide any result new, unexpected, or differing in kind. All of the claims in suit are therefore clearly invalid as mere aggregations of old elements.

Lastly, it is submitted that the claims are so vague and nebulous as to be fatally indefinite and therefore void as failing to comply with 35 U. S. C. A., Section 33. Each of such claims is wholly indefinite at the exact point of novelty asserted by the patent, *i. e.,* in defining the interjacent section as having mean-line camber or thickness ratio "at variance with" or "greater than" or "less than" that obtainable by straight-line fairing.

It is respectfully submitted that the judgment of the District Court should be reversed *in toto,* and the action dismissed.

Dated December 29, 1951.

Respectfully submitted,

Robert B. Watts,
Fred Gerlach,
Harris, Kiech, Foster & Harris,
Ford Harris, Jr.,
Attorneys for Defendants-Appellants.

APPENDIX A.

APPENDIX A.

The Conventional Aircraft Wing.

While aircraft wings have been made in many configurations, a typical conventional wing is illustrated in Plate I, page 9 of the foregoing brief, for reference in connection with the following glossary:

Plate 1, Fig. 1, is a plan or top view of a conventional two-engine airplane showing its essential components.

Fig. 2 is an enlarged plan or top view of one semi-span of the aircraft shown in Fig. 1, omitting the engine nacelle for clarity.

Fig. 3 is a front view of the semi-span shown in Fig. 2.

Fig. 4 is a cross section of the semi-span on line AA of Fig. 2.

Each of the cross sections through an aircraft wing is termed an *airfoil section* or *profile.* In addition to the area and shape of a wing, the selection of the airfoil sections from which the wing contours are derived determines its aerodynamic characteristics. There is a wide diversity of airfoil sections known and used in the design of aircraft, a number of which are shown in Defendants' Ex. VVV. Generally speaking, the upper contour of an airfoil section or its *upper camber* is convex, while its lower contour or *lower camber* is straight or slightly concave, the two contours being joined to form a *leading edge* by means of a *leading edge radius,* and converging to a relatively sharp *trailing edge.* The flow of air over the upper and lower contours of an airfoil section creates a pressure differential which results in the ability of the section to develop a lifting force when inclined upwardly in an airstream.

In an airfoil section, the median line between the upper and lower cambers gives a curve which is called the *mean-line camber.* The maximum height of the mean-line camber above a straight line joining the leading and trailing edges (*the chord*) divided by the chord is the *mean-line camber ratio* which is usually expressed as a percentage.

In the conventional aircraft wing shown in Plate I, the taper from root to tip is uniform, *i. e.,* straight lines connect the fluid-foil section at the root of the semi-span (*i. e.,* the *root section*) with the fluid-foil section at the wing tip (*i. e.,* the *tip section*). For the purposes of this case, such uniform taper between root and tip is referred to in the evidence as *straight-line fairing or lineal fairing.* Such *lineal* or *straight-line fairing* may be between any two fluid-foil sections of the wing, *e. g.,* between root and tip, as shown in Plate I, or between any two intermediate or *interjacent* sections.

Plate II, bound opposite page 9 of the brief, will assist in an explanation of the meaning of *"stall"* in an airplane wing. The upper figure thereof shows a section taken through a conventional wing in flight, the air flow over and under the wing being illustrated by lines. In Fig. 1, the chord line of the wing is substantially horizontal and the direction of the air stream is indicated by the arrow. As will be noted, there is a substantially clean separtion of the air at the leading edge, and a smooth flow of air over and under the wing, which is essential to produce lift.

If the nose of the airplane is directed upwardly, the wing may take the position indicated in the middle figure, in which the chord line of the wing makes a sub-

stantial angle with the horizontal line, which angle is the *angle of attack.* As illustrated, the air-flow lines still show a clean separation at the leading edge and a smooth flow over most of the wing. At the rear of the wing, however, on its upper surface, the clean air flow has separated from the wing, causing an area of air turbulence, indicated as "stalled area." Due to this turbulence, there is little or no aerodynamic lift over the "stalled area." There is sufficient aerodynamic lift over the balance of the surface of the wing, however, to insure substantially normal flight of the airplane.

As the angle of attack is increased to a position as shown in the lower figure, the air separation ("stalled area") likewise increases and the lift decreases until such time as the total wing lift is insufficient to support the aircraft in the air, at which time the craft falls, normally going into a dive with the nose down. The point at which the aircraft starts to fall is actually the *stall point,* but prior thereto there may be stall areas on the upper surface of the wing due to such air separation.

Adjacent the wing tips of a conventional airplane, *ailerons* are normally provided on the trailing edge of the wing, which are used to control flight. If a substantial part of the aileron area of the wing is stalled, due to a substantial increase in the angle of attack of the airplane, it may be impossible to control flight, as the ailerons may then become ineffective, and this unfavorable condition is known as *tip stall.*

Glossary.

Aileron: A hinged or movable portion of the trailing edge of an airplane wing for controlling the lateral motion of the airplane.

Airfoil: A surface or aircraft component, such as an airplane wing, aileron, rudder, elevator, designed and intended to react with an air stream to produce lift.

Airfoil Section: A transverse section through a wing.

Angle of Attack: The angle between the chord of an airfoil section and the relative air stream.

Camber: The rise of the contours of an airfoil section from the chord; usually expressed as the ratio of the departure of the curve from the chord to the length of the chord.

Chord: An arbitrary datum line from which the ordinates and angles of an airfoil section are measured; the straight line between the leading and trailing edges.

Drag: The combination of the total air force on a body parellel to the relative wing.

Fairing: Structural shape, cowl, or covering to house an irregularity in order to reduce drag.

Flaps: A pivoted airfoil usually at the trailing edge of the wing near the fuselage used to vary the effective camber.

Fuselage: The body to which the wings and tail of an airplane are attached.

Interjacent Station: A spanwise section between the root section and tip section of a wing.

Leading Edge: The foremost edge of an airfoil with reference to its direction of movement through the air.

Lift Coefficient: An arbitrary function denoting the degree of lift force obtainable from an airfoil or airfoil section under a given set of conditions.

Mach Number: The ratio of the velocity of an airfoil in flight to the speed in sound.

Maximum Thickness: The greatest thickness of the airfoil section measured or a line maximum to the chord and is usually expressed as a per cent of the chord length.

Mean-Line Camber: The rise of the median line between the upper and lower contours of an airfoil section from the chord, usually expressed as the ratio of the maximum amount of departure from the chord of the section to the length of the chord.

Nacelle: A fairing, usually to enclose a power plant.

Planform Taper: A change in chord length along the wing span from the root to the tip, usually expressed in the ratio of the root chord to the tip chord, such as 3 to 1.

Reynolds No.: A non-dimensional coefficient used as a measure of the dynamic scale of a flow.

Root (Wing): The inboard end of the wing adjoining the fuselage.

Semi-span: The maximum distance between the center-line of the fuselage and the wing tip.

Span: The maximum distance from wing tip to wing tip of an airplane.

Stall: The condition of an airfoil or airplane in which it operates at an angle of attack greater than the angle of attack of maximum lift.

Tail: The rear components of an airplane usually consisting of a system of horizontal and vertical stabilizing

planes or fins to which movable control surfaces are mounted such as elevators and rudders.

Tip (Wing): The outer end of an airplane wing.

Thickness Ratio: The ratio of the thickness of an airfoil section to the length of the chord; usually to denote the ratio of the maximum thickness of the section to the chord length.

Trailing Edge: The rearmost edge of an airfoil with reference to the direction of movement through the air.

Wing: An airfoil designed primarily to produce the lift force necessary to sustain an airplane in flight.

APPENDIX B.

APPENDIX B.

". . . However, an anticipating fact [Dunn's application] prior to the date of Anderson's application was proved beyond a reasonable doubt, thereby shifting the burden of proof to the plaintiff to prove, by a preponderance of the evidence, that his invention was made still earlier than when that fact occurred. *It is elementary in patent law that an invention is not complete until it is 'reduced to practice.'* An application for a patent is equivalent to a reduction to practice, designated by the courts for convenience as 'constructive reduction to practice.' However, when in a case like the one under consideration it is desired to carry the date of invention back of the date of application, *earlier actual reduction to practice is required to be proved.*

"It will be noted that the entire evidence presented in support of plaintiff's claim consisted of the oral testimony of Anderson and Dunn, above outlined, and the sketch which Anderson claimed he made about the time of his claimed conception of the invention. This sketch cannot be said in any sense to prove a reduction to practice, . . ." [Emphasis added.]

Hann v. Venetian Blind Corp., 111 F. (2d) 455, at 458 (1940).

". . . No formal granting of a license is necessary in order to give it effect. Any language used by the owner of the patent or any conduct on his part exhibited to another, from which that other may properly infer that

the owner consents to his use of the patent in making or using it, or selling it, upon which the other acts, constitutes a license and a defense to an action for a tort . . ."

De Forest Radio Telephone & Telegraph Co. v. United States, 273 U. S. 236, 71 L. Ed. 625.

"While it is true that the invention was made before Lawson, one of the inventors, became connected with appellee, yet it was Lawson, as one of appellee's stockholders and officers, and as a superintendent of manufacture, who expended much of appellee's time and considerable of its money in adapting the invention to practical use in appellee's business. The experimentation and expense proceeded during the two years of his association with appellee. If at that time his efforts had been attended with success, and a considerable trade established in gloves made under that patent, it would scarcely be questioned that a shop right accrued to appellee.

"If the final step which led to a successful application of the patent to appellee's business was not taken until after Lawson's relations with appellee had ceased, should appellee be held thereby to have lost the benefit of its previous expenditures and efforts to that end under the patentee's direction? We think not, but rather that, in fairness, they were authorized to continue to make available to them the investment and experimentation theretofore made with Lawson's direction and co-operation in the undertaking to employ his invention in the joint enterprise of himself and the others interested in appellee corporation."

Elzilaw Co. v. Knoxville Glove Co., 22 F. (2d) 962 (C. C. A. 2d, 1927).

". . . The George invention, if any was disclosed in his crude model, was an inadequate conception, which had never been embodied in a machine. It was uncertain whether he would or could obtain a patent. He presented it to his employer, and allowed his employer to risk a substantial investment in constructing machinery and bringing it into practical use, without any suggestion that, if these efforts proved successful, the employer would be required to pay toll for the use of the invention thus perfected.

"The sense of justice underlying the equities of such a situation was emphasized by Dickinson, District Judge, in Mix v. National Envelope Co. (D. C.), 244 F. 822. The license to be implied should be coextensive with the employer's business requirements, because the obvious purpose with which invention and investment were made was to satisfy those requirements, and if the scope of the license was to be less than the breadth of this purpose it was the duty of the employee to say so. No formal granting of a license was necessary. Silence, under all the circumstances, was sufficient to give effect to a license commensurate with the obvious purpose of the parties . . . " (pp. 1007, 1008).

> *Tin Decorating Co. v. Metal Package Corp.*, 29 F. (2d) 1006 (aff'd 37 F. (2d) 5, and cert. denied).

" 'The doctrine of the shop right is of equitable origin. The principle involved is that where an inventor or owner of an invention acquiesces in the use of the invention by another, particularly where he induces and assists in such use without demand for compensation or other notice of restric-

tion of the right to continue, he will be deemed to have vested the user with an irrevocable, equitable license to use the invention. This situation between the inventor and employer might, of course, arise by mutual agreement, but generally the situation arises where the inventor induces his employer to proceed and not only fails to object to the use, but stands by or assists, while permitting his employer to assume expense and put himself in a position where it would be to his detriment to be compelled to relinquish further use of the invention.' "

> *Gate-Way v. Hillgren,* 82 F. Supp. 546 (D. C. Calif. 1949, aff'd 181 F. (2d) 1010).

"While the evidence shows that the invention was discussed at various times with various executives of the defendants, not only did they not assert any right thereto, but *from the very beginning they considered it impractical,* and so stated to the plaintiff. And, in one instance, at least, the statement of impracticability was admittedly stated in not very genteel language. The fullest disclosure of the patent invention made *to the head of the defendants' Patent Department, on March 2, 1945,* and passed through channels, *bears the final rejection* in a pencilled notation, 'Not (interested) at this time.' [Plaintiff's Exhibit 25.] And that notation, like the 'damned spot' in Macbeth, will not 'out,' for all adjurations. *For it spells rejection* of the invention, . . ." [Emphasis added.]

> *Memorandum Decision* [R. 40-43].

"There remains the question as to whether Appel's device does anticipate appellee's device. The differences between the two devices, as stated above and as re-

lated by witness McDougall, are in the form or shape of such devices. Are the changes in Appel's device made by appellee sufficient to impart invention to appellee's device? We think not. The rule on that point is an aged one, and is stated in Smith v. Nichols, 21 Wall. 112, 88 U. S. 112, 119, 22 L. Ed. 566, as follows: '* * * But a mere carrying forward or new or more extended application of the original thought, a change only in form, proportions, or degree, the substitution of equivalents, doing substantially the same thing in the same way by substantially the same means with better results, is not such invention as will sustain a patent. * * *'

* * * * * * * * *

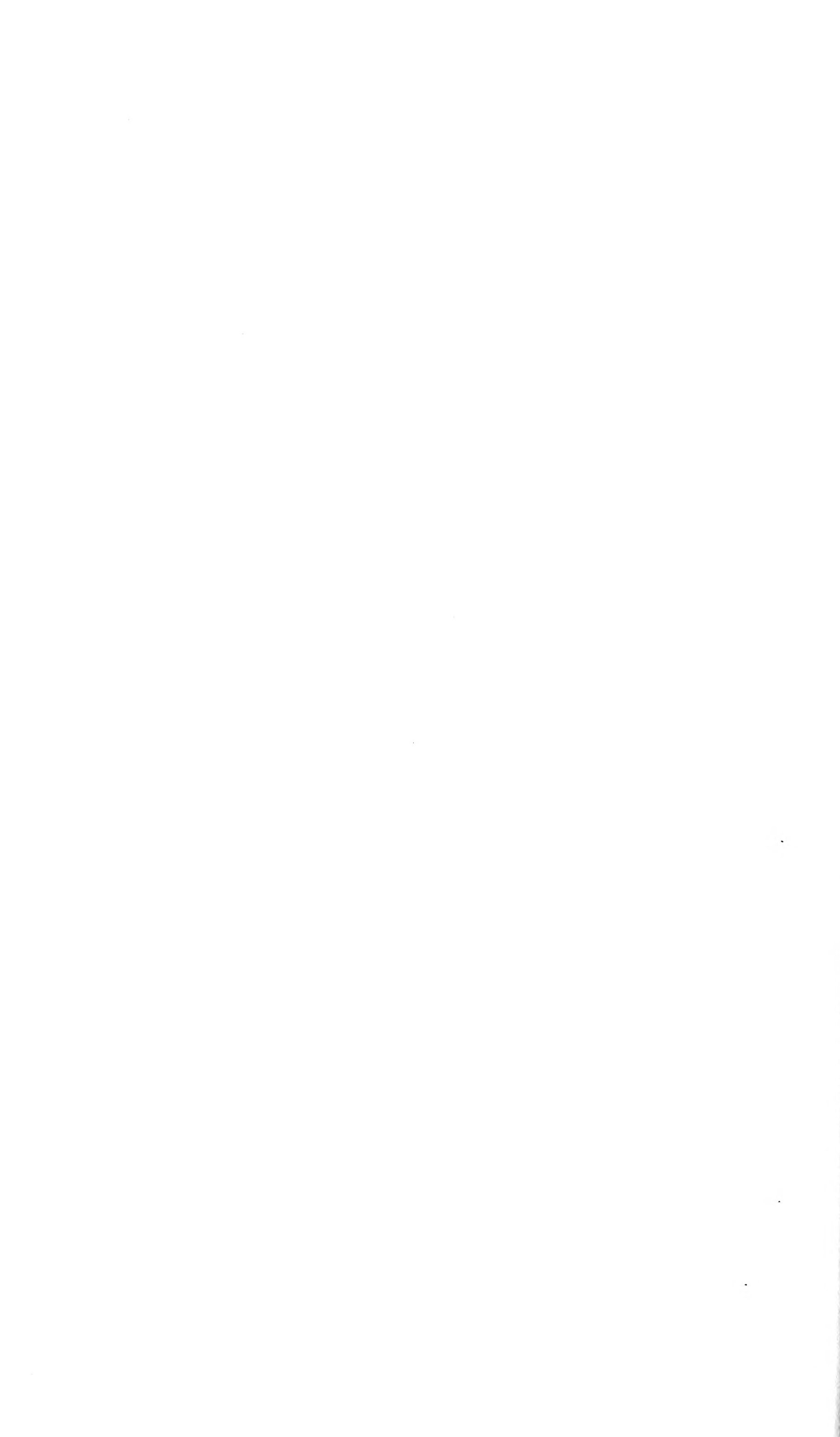
"Here, the most that can be said for appellee's device is that appellee extended the application of Appel's device, and changes in the form thereof. The two devices do the same thing, *i. e.,* prevent wear of the housing. They do it in the same way, *i. e.,* by causing the wear to be absorbed by the liner instead of the housing. Are substantially the same means used? We think they are . . ."

Bingham Pump Co., Inc. v. Edwards, 118 F. (2d) 338 (1941), at 340.

". . . There is no exact standard by which a court may determine when a combination of old elements constitutes invention and when it is within the mechanical skill of one working in the art. The most recent opinion of the Supreme Court on combination patents expresses the view that, 'courts should scrutinize combination patent claims with a care proportioned to the difficulty and improbability of finding invention in an assembly of old elements.' Great Atlantic & Pacific Tea Co. v. Super-

market Equipment Corp., 340 U. S. 147 [87 U. S. P. Q. 303, 306]. The test to be applied to such patents is that the combination must perform some new or different function—one that has unusual or surprising consequences. It is our view that the patent in suit fails to meet this severe test and does not constitute invention. The most that can be said for the patent in suit is that it rearranges the elements of the slit camera in such a manner that in the performance of their respective functions a higher degree of accuracy is obtained . . ."

Photochart v. Photo Patrol, Inc., 189 F. (2d) 625 (1951).



APPENDIX C.

Feb. 21, 1950 M. A. GARBELL 2,498,262

FLUID FOIL LIFTING SURFACE

Filed Sept. 16, 1946 3 Sheets-Sheet 1

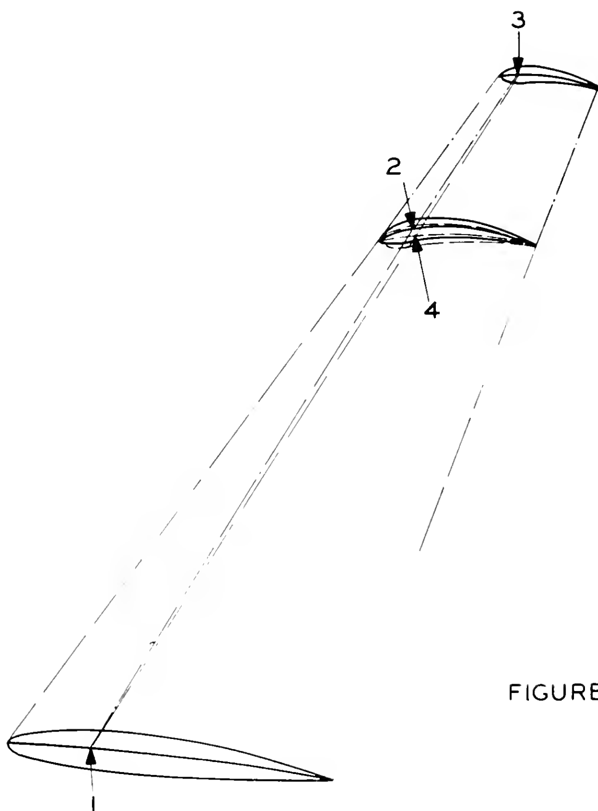


FIGURE 1

Maurice A. Garbell INVENTOR.

BY Naylor and Lassagne

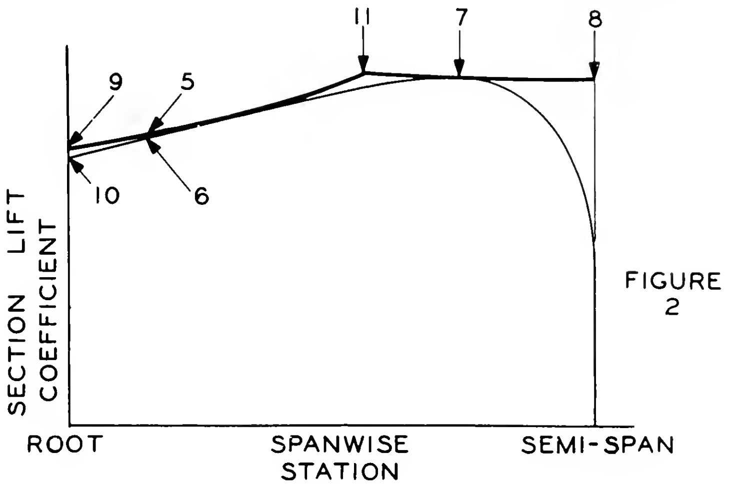
ATTORNEYS

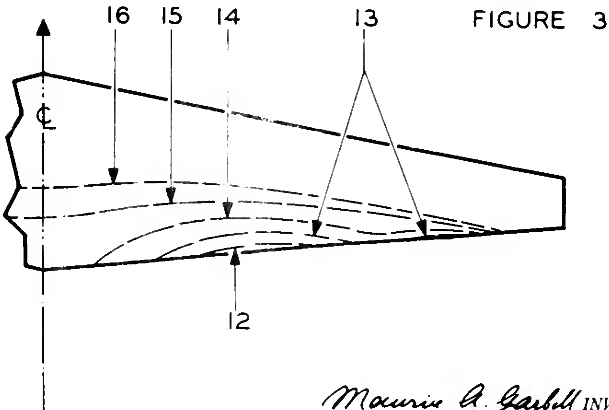
Feb. 21, 1950 M. A. GARBELL 2,498,262

FLUID FOIL LIFTING SURFACE

Filed Sept. 16, 1946

3 Sheets-Sheet 2





Maurice A. Garbell INVENTOR.

BY Naylor and Lassagne
ATTORNEYS

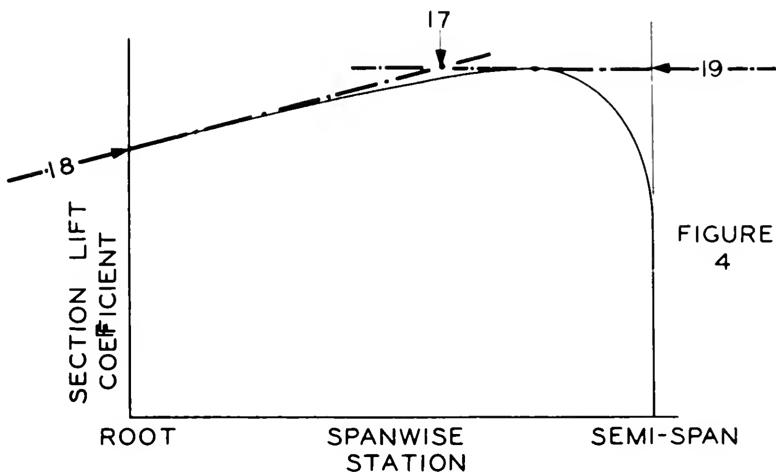


FIGURE 4

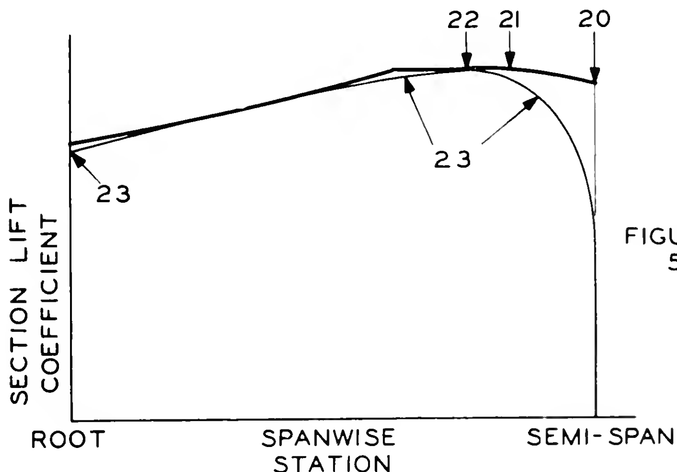


FIGURE 5

Maurice A. Garbell INVENTOR.

BY Naylor and Lassagne
ATTORNEYS

Patented Feb. 21, 1950 2,498,262

UNITED STATES PATENT OFFICE

2,498,262

FLUID FOIL LIFTING SURFACE

Maurice A. Garbell, San Francisco, Calif., assignor, by direct and mesne assignments, of one-fourth to Maurice A. Garbell, Inc., San Francisco, Calif., a corporation of California, and three-fourths to Garbell Research Foundation, San Francisco, Calif., a corporation of California

Application September 16, 1946, Serial No. 697,281

12 Claims. (Cl. 244—35)

1

This invention relates to the design and construction of surfaces to be driven through a fluid, and in particular through the air, intended to produce a useful force component perpendicular to the relative velocity of the fluid with respect to the surface; the said useful force component will be referred to hereinafter as "lift," and the said surfaces will be referred to hereinafter as "lifting surfaces."

The present application is a continuation in part of my co-pending application entitled Fluid foil lifting surface, Serial Number 683,815, filed on July 16, 1946, now Patent No. 2,441,758 of May 18, 1948, the general object of which is the attainment of good stalling characteristics on lifting surfaces by means of a novel method of fluid-foil selection, wherein the mean-line camber and if necessary the thickness ratio of one or more fluid-foil sections interjacent between the root and the tip of the lifting surface are varied from the respective values obtainable by straight-line fairing between the root and tip sections by following the subject method of the said co-pending application.

The general objects of the invention specified in the instant application are the attainment of good stalling characteristics, the elimination of violent rolling moments, the creation of stable nose-down pitching moments at the stall, the maintenance of adequate lateral-control effectiveness, the reduction of the fluid-dynamic drag, and a reduction of the resulting drag moment with respect to the root of the lifting surface.

Another object of the invention specified in the instant application is the attainment of especially high lifting-surface lift coefficients in those designs in which engineering considerations other than those pertaining solely to the control of stalling characteristics permit the fluid-dynamical design engineer to utilize interjacent fluid-foil sections having a mean-line camber greater than the mean-line camber of the section at the root or the section at the tip of the lifting surface, wherein the spanwise location, mean-line camber, and thickness ratio of the said interjacent fluid-foil sections are defined and explained in the subject specification of this invention.

Other objects and advantages will be apparent from an examination of the drawings accompanying the instant application taken in conjunction with the following, and in which:

Figure 1 shows a schematic perspective view of a lifting surface designed and constructed according to the method outlined in the subject specification.

2

Figure 2 illustrates the spanwise distribution of actually prevailing section lift coefficients and the spanwise distribution of maximum attainable section lift coefficients on a typical lifting surface designed and constructed according to the subject method of this invention.

Figure 3 illustrates the typical inception and growth of the stall of a lifting surface designed and constructed according to the subject method of this invention.

Figure 4 illustrates the procedure employed in the finding of the optimum spanwise location of the third controlled fluid-foil section in a lifting surface designed and constructed according to the subject method of this invention.

Figure 5 illustrates the spanwise distribution of actually prevailing section lift coefficients and the spanwise distribution of maximum attainable section lift coefficients on a typical lifting surface designed and constructed according to the subject method of this invention, the tip section of said lifting surface having a thickness ratio smaller than the optimum thickness ratio for absolutely maximum attainable section lift coefficient for the series of fluid-foil sections employed in the lifting surface.

A preferred embodiment of this invention is described in the following specification; the broad scope of the invention is expressed in the claims concluding the instant application.

The invention consists of novel methods and combinations of methods described hereinafter, all of which contribute to produce a safe and efficient lifting surface.

Referring to the drawings for more specific details of the invention, Figure 1 serves to illustrate the preferred embodiment of this invention, comprising a lifting surface with three or more "controlled" fluid-foil sections, in which a section with a small mean-line camber **1** is located at the root of the lifting surface, a section with a greater mean-line camber **3** is located at the fluid-dynamically effective tip of the lifting surface (the actual tip fairing of the lifting surface may comprise a faired three-dimensional body without identifiable mean-line camber, which is not of any consequence in the application of the subject invention), and one or more interjacent sections **2** are selected following the method outlined below, said interjacent fluid-foil sections having values of the mean-line camber at variance with the values **4** obtainable at the respective spanwise stations by means of straight-line fairing between the fluid-foil section located at the root and the fluid-foil section located at the

tip of the lifting surface, wherein the respective values of the mean-line camber of one or more of the interjacent fluid-foil sections exceed the mean-line camber of the more highly cambered tip section. It shall be understood that the preceding considerations apply to all types of lifting surfaces regardless of the respective thickness ratios of the root and tip sections. It shall also be understood that additional considerations relative to the respective thickness ratios of the various controlled fluid-foil sections are presented herein for lifting surfaces wherein the thickness ratio of the root section is the greatest, and the thickness ratio of the tip section is the smallest, respectively, of any fluid-foil section employed in the lifting surface.

Figure 2 illustrates the preferred manner in which this invention, through the employment of the aforementioned method of fluid-foil selection, achieves the establishment of a curvilinear polygon **5** describing the spanwise distribution of maximum attainable section lift coefficients, said curvilinear polygon being so shaped that it envelops closely the curve **6** describing the spanwise distribution of the actually prevailing section lift coefficients, except that beyond the spanwise point **7** at which the highest actually prevailing section lift coefficient occurs the maximum attainable section lift coefficient exceeds substantially the actually prevailing section lift coefficient, so that the stall inception occurs near midsemispan, spreads more prevalently inboardward and to a smaller extent outboardward as shown in orderly progression by curves **12**, **13**, **14**, **15**, and **16** in Figure 3, and does not involve the extreme tip of the lifting surface prior to the breakdown of the fluid flow over the entire remaining lifting surface. As used herein the curvilinear polygon **5** describing the spanwise distribution of maximum attainable section lift coefficients is established by the respective values of the maximum attainable lift coefficients of the root section **9**, the tip section **8**, and the third or additional control section **11**, and by the respective maximum attainable lift coefficients **5** of the sections obtained by conventional fairing between each pair of controlled sections **9—11**, **11—8**, etc.

The curve **6** describing the spanwise distribution of the actually prevailing section lift coefficients at the maximum lift coefficient of the lifting surface is obtained by conventional methods of experimentally verified calculation for the desired lifting surface, taking into consideration the planform, effective aerodynamic washout, section lift-curve-slope characteristics, etc.

The term "envelopment" as used herein signifies the establishment of curvilinear polygon **5** on the convex side of the curve **6**, wherein each individual branch **9—11**, **11—8**, and so forth of the curvilinear polygon **5** is tangent or nearly tangent to curve **6**.

The following specification outlines the method employed in the design of the subject lifting surface of this invention, whereby to select the most opportune values of fluid-foil section mean-line camber and fluid-foil section thickness ratio required to achieve the objects of the instant invention:

To apply the subject method of this invention it is actually necessary to know only the planform of the lifting surface and the desired stall pattern. Inasmuch as practical considerations other than those pertaining solely to the control of the stalling characteristics ordinarily predetermine certain design parameters of the lifting surface, preferred embodiments of the subject method of this invention are hereinafter explained for two typical combinations of predetermined design parameters:

In the first typical configuration the following design parameters, for example, are assumed to be given a priori: (*a*) the planform of the lifting surface, based on structural and practical design considerations; (*b*) the series of fluid-foil sections to be employed, based on high-speed and other performance requirements; (*c*) the maximum permissible effective aerodynamic washout, based on drag considerations and structural bending-moment limitations; (*d*) the thickness ratio of the fluid-foil section at the root, based on the critical-Mach-Number requirements and structural weight considerations; (*e*) the thickness ratio of the fluid-foil section at the tip, based on practical space requirements for control-surface balances, etc.; (*f*) the maximum mean-line camber of any fluid-foil section on the lifting surface, based on drag and pitching-moment limitations.

The subject method of this invention is employed firstly to design the lifting surface without any effective aerodynamic washout, that is, with the three or more controlled fluid-foil sections placed at such an angle of incidence with respect to the reference chord plane of the lifting surface that the said fluid-foil sections operate at their respective zero-lift angles of attack when the entire lifting surface operates at its angle of attack for zero overall lift.

Based on fundamental experimental wind-tunnel data available for the preselected series of fluid-foil sections, graphs are plotted showing the variation in the maximum attainable section lift coefficient versus the mean-line camber, thickness ratio, and Reynolds number, respectively; similar graphs are plotted showing the variation in the section zero-lift angle of attack versus the mean-line camber, thickness ratio, and Reynolds number, respectively.

For the spanwise location of the third and additional controlled sections **2** and **11**, the subject method of this invention utilizes preferably locations between the spanwise point of the highest actually prevailing section lift coefficient **7** and the spanwise point located twice as distantly from the tip **8** as point **7**, with a preferable optimum at the point **17**, where the tangent to the inboard portion of the curve of spanwise distribution of the actually prevailing section lift coefficients **18** intersects the horizontal tangent **19** to the same curve, as shown in Figure 4.

It will be understood, however, that inescapable practical design considerations may require that the additional controlled sections **2** and **11** be placed at spanwise stations located inside power plant nacelles or at those spanwise stations where the lifting surface is mechanically jointed for sudden changes in planform taper, or sweep-back, as is the case in craft with removable or foldable outboard panels.

The thickness ratio obtainable at the third section **11** is calculated by straight-line interpolation between the root section and the tip section or is determined by such structural or other criteria of different nature as may be considered to prevail. However, the subject method of this invention teaches that best results are achieved if the thickness ratio of the tip section **3** is smaller than the optimum section thickness ratio for absolutely maximum attainable section lift coefficient of the fluid-foil series chosen, and if the thickness ratio of the

third section 2 and 11 is chosen equal to or slightly greater than the said optimum thickness ratio, so that the optimum thickness ratio occurs either at the third section 2 and 11 or at a spanwise location 21 near the point 22 of highest actually prevailing section lift coefficient.

The approximate maximum attainable lift coefficient of the entire lifting surface for appropriate values of the Reynolds number is estimated for example by dividing the maximum attainable section lift coefficient of the third fluid-foil section (obtained from the aforementioned wind-tunnel data for the selected values of the section thickness ratio and the maximum permissible mean-line camber) by the highest spanwise value of the "additional section lift coefficient

$$C_{l_{a_1}}\text{"}$$

(as defined in Army-Navy-Commerce Manual ANC-1(1) entitled "Spanwise Air-Load Distribution"), as follows:

$$C_{L_{max}}=\frac{C_{l_{max}}\text{ of interjacent section}}{C_{l_{a_{1\,highest}}}}$$

and by repeating this operation with checks of the Reynolds number of the said most highly cambered interjacent section as specified in the co-pending application, until the maximum attainable lift coefficient of the lifting surface is accurately determined.

The spanwise distribution 6 of the actually prevailing section lift coefficients is then calculated for the maximum lift coefficient $C_{L_{max.}}$ of the entire lifting surface, following one of the conventional calculation methods.

For the Reynolds number and the pre-selected thickness ratio of the tip section, the required value of the mean-line camber is determined from the graph showing the experimentally measured variation of the maximum attainable section lift coefficient with varying mean-line camber, selecting that value of the mean-line camber that produces a maximum attainable section lift coefficient 8 substantially equal to the highest actually prevailing section lift coefficient 7.

For the Reynolds number and the pre-selected thickness ratio of the root section, the required value of the mean-line camber is determined from the graph showing the experimentally measured variation of the maximum attainable section lift coefficient with varying mean-line camber, selecting that value of the mean-line camber that produces a maximum attainable section lift coefficient 9 equal to or slightly superior to the section lift coefficient 10 actually prevailing over the root section.

From the foregoing, it will be readily seen that the lifting surface obtained by the invention, and defined by the curvilinear polygon 5, embodies the combination of a fluid-foil section 1 or 9 having the smallest mean-line camber at the root, a fluid-foil section 3 or 8 having a greater mean-line camber at the tip, and one or more interjacent controlled sections 2 or 11 having values of the mean-line camber at variance with the values 4 obtainable at the respective spanwise stations by means of straight line fairing between the root section and the tip section, wherein the mean-line camber of the third or an additional interjacent controlled section exceeds the mean-line camber of the more highly cambered tip section, while avoiding the undesirable effects of any material amount of aerodynamic washin.

If, for reasons other than those pertaining solely to the control of stalling characteristics, washout is desired, a small amount of effective aerodynamic washout is introduced, ½° to 1° in each step of the application of the method, wherein the total effective aerodynamic washout is distributed in appropriate fashion between the controlled sections and where the total washout is less than the maximum permissible washout as defined in the aforesaid initial design assumptions. The entire heretofore specified procedure including the establishment of a curve 6 conforming to the washout chosen is then repeated for the selected amount of effective aerodynamic washout, until the desired results as illustrated in Figures 2 and 3 are attained while satisfying the aforesaid requirements of different nature.

A typical example of the application of the principles of this invention to one well-known type of lifting surface is as follows: Here we assume a planform taper ratio of three to one, an aspect ratio of ten, a total effective aerodynamic washout of zero degree, a section thickness ratio tapering linearly from 22 per cent at the root to 15 per cent at the tip, the utilization of "63–" series NACA "low-drag" fluid-foil sections, a mean-line camber of the most highly cambered controlled section 2 characterized by an "ideal lift coefficient" C_{l_i} equal to 0.4. The term "ideal lift coefficient" is to be interpreted as defined by the National Advisory Committee for Aeronautics nomenclature and is herein used as a parameter characteristic of the mean-line camber of a fluid-foil section. Calculations based on conventional methods will indicate that a lifting surface having the above general design parameters will experience, at its maximum resultant lift coefficient, a distribution of section lift coefficients as illustrated in curve 6.

Following the procedures hereinbefore described, we achieve in the above-outlined construction the desirable stalling characteristics taught by this invention by placing the most highly cambered controlled section at a station approximately 70 per cent of the semi-span from the root and with an effective aerodynamic washout of zero degree with respect to the root section and through the use of mean-line camber of the root section 1 characterized by an "ideal lift coefficient" C_{l_i} equal to 0.1, and a mean-line camber of the tip section 3 characterized by an "ideal lift coefficient" C_{l_i} equal to 0.35.

In this structural example the mean-line camber of the interjacent controlled section 2 is greater than that of the root section 1 and of the tip section 3, and hence greater than that of the interpolated section 4 obtainable at the 70 per cent semi-span station by means of straight-line fairing between sections 1 and 3, and which accomplishes the envelopment of curve 6 by the curvilinear polygon 5

It will be fully appreciated by those skilled in this art that the invention may be readily embodied in various devices wherein the thickness ratio of the interjacent section 2 is varied from that obtainable through straight-line fairing between root section 1 and tip section 3 in order to facilitate the attainment of the objectives of this invention with the smallest possible range of values of section mean-line camber.

The second typical configuration differs from the first in that two interjacent sections 2 may be utilized. Hence, the following design pa-

rameters are assumed to be given a priori: (*a*) The plan form of the lifting surface; (*b*) the series of fluid-foil sections to be employed and their fluid-dynamic characteristics; (*c*) the maximum permissible effective aerodynamic washout; (*d*) the thickness ratios of the fluid-foil section at the root and of the fluid-foil section at the tip, respectively; (*e*) the maximum mean-line camber to be assigned to any fluid-foil section on the lifting surface.

The number of interjacent "controlled" fluid-foil sections, in this case, is not limited. The following representative specification applies to the case of two interjacent controlled fluid-foil sections; however, the reasonings specified therein are obviously usable in the design of lifting surfaces with a different number of interjacent controlled sections. Here it will be understood that the values of the mean-line camber of one or more of the interjacent controlled sections 2 are greater than that of the more highly cambered tip section 3, while one or more of the remaining interjacent controlled sections 2 may be either greater or smaller than that of the aforementioned tip section 3, depending on the range of section thickness ratios encountered between the root and the tip of the lifting surface.

In this case the instant method teaches that the optimum spanwise location for the interjacent fluid-foil section having the greatest mean-line camber is in the vicinity of the spanwise station carrying the highest actually prevailing section lift coefficient 7, and that the optimum spanwise location for the second interjacent fluid-foil section is point 17, where the tangent at the root to the curve of spanwise distribution of the actually prevailing section lift coefficients 18 intersects the horizontal tangent 19 to the same curve, as shown in Figure 4. The instant method also teaches that best stalling characteristics are obtained by assigning to the two or more interjacent fluid-foil sections values of the section thickness ratio that, for the series of fluid-foil sections selected, yield the absolutely maximum attainable section lift coefficients.

The approximate maximum attainable lift coefficient of the entire lifting surface is estimated by dividing the maximum attainable section lift coefficient of the most highly cambered fluid-foil section by the highest spanwise value of the "additional section lift coefficient

$$C_{l_{a_1}}$$"

in a manner substantially similar to that previously outlined.

The spanwise distribution of the actually prevailing section lift coefficients 23 is then calculated for the maximum lift coefficient of the entire lifting surface as previously outlined.

For the Reynolds number of the additional interjacent fluid-foil section, preferably located at the spanwise station 17 abovedefined, the required value of the mean-line camber and if necessary the thickness ratio is determined substantially as outlined for the fluid-foil section 11 in the co-pending application.

The value of the mean-line camber of the fluid-foil section located at the tip of the lifting surface is not of consequence in the application of the subject method of this invention, provided that the maximum attainable section lift coefficients represented by the curved segment connecting points 22 and 20 Figure 5 remains substantially above the curve of actually prevailing section lift coefficients 23.

If the designer intends to achieve positive stall inception in a certain spanwise panel of the lifting surface, the subject method of this invention specifies that in either of the aforedescribed design procedures the mean-line camber and thickness ratios, as well as the spanwise location, of the sections comprised within or adjacent to the panel for which stall inception is desired be so selected that within the "stall inception panel" the curve of maximum attainable section lift coefficients lies slightly below the curve of actually prevailing section lift coefficients, without modifying the aforedescribed relationship of the maximum attainable section lift coefficients and the actually prevailing section lift coefficients on the remainder of the semispan of the lifting surface outside of the "stall-inception panel" proper.

If, in any of the aforedescribed cases, the lifting surface under consideration is modified by excrescences such as, for example, power-plant nacelles, or flaps that modify the local zero-lift angle and the local maximum attainable section lift coefficient, the calculation of the maximum attainable section lift coefficients and of the effective washout at the various spanwise stations takes due account of the effects of these modifications by introducing "equivalent values" of the effective washout and section mean-line camber into the subject method of this invention.

Upon completion of the procedure outlined for the subject method of this invention, the zero-lift angles of the fluid-foil sections selected thusly are determined for their respective mean-line cambers, thickness ratios, and Reynolds numbers, and each fluid-foil section is set properly with respect to the reference chord plane of the lifting surface, so that the desired effective washout is achieved.

By practicing my invention a lifting surface can be designed and constructed to achieve the objects hereinbefore stated.

Theoretical calculations, as well as numerous tests performed in flight and in the laboratory, have demonstrated convincingly that each of the objects of this invention has been fully achieved.

The inventor wishes it to be clearly understood that the generally judged excellently satisfactory stalling characteristics of lifting surfaces designed and constructed according to the subject method of this invention are directly attributable to the use of three (or more) controlled fluid-foil sections selected according to the hereinbefore specified method of this invention, and to the aforedescribed method employed in the design of such lifting surfaces.

This invention accomplishes an important improvement in the art, and the discoveries herein disclosed are of great value to all types of aircraft (as well as to craft operating in other fluids), throughout their entire operating range, and especially in the critical low-speed operation where steadiness of lift and lift variation, stability of the craft, control effectiveness, and smoothness and stability of control forces are of vital importance for the safety and efficiency of the craft; also in violent maneuvers at high speeds when high lifting-surface lift coefficients comparable with those occurring at the low-speed stall are encountered and even temporarily surpassed.

I claim:

1. A lifting surface with three or more controlled fluid-foil sections, in which the first sec-

tion with a small mean-line camber is located at the root, the second section with greater mean-line camber is located at the fluid-dynamically effective tip, and the third or additional fluid-foil sections are located at stations interjacent between the root and the tip, wherein the values of the mean-line camber of the interjacent fluid-foil sections are at variance with the values of the mean-line camber obtainable at the respective spanwise stations by means of straight-line fairing between the fluid-foil section located at the root of the lifting surface and the fluid-foil section located at the tip of the lifting surface, and wherein the mean-line camber of one or more of the interjacent fluid-foil sections exceeds the mean-line camber of the more highly cambered tip section, said three or more controlled fluid-foil sections having values of the mean-line camber selected in such manner that the resulting spanwise distribution of maximum attainable section lift coefficients of the three or more controlled sections forms a curvilinear polygon enveloping a curve representing the spanwise distribution of section lift coefficients prevailing at the maximum attainable lift coefficient of the lifting surface, for a given planform and discarding the effect of any material amount of aerodynamic washin.

2. A lifting surface with three or more controlled fluid-foil sections adapted to provide stall inception within a predetermined interval of spanwise stations, in which the first section with a small mean-line camber is located at the root, the second section with greater mean-line camber is located at the fluid-dynamically effective tip, and the third or additional fluid-foil sections are located at stations interjacent between the root and the tip, wherein the values of the mean-line camber of the interjacent fluid-foil sections are at variance with the values of the mean-line camber obtainable at the respective spanwise stations by means of straight-line fairing between the fluid-foil section located at the root of the lifting surface and the fluid-foil section located at the tip of the lifting surface, and wherein the mean-line camber of one or more of the interjacent fluid-foil sections exceeds the mean-line camber of the more highly cambered tip section, said three or more controlled fluid-foil sections having values of the mean-line camber selected in such manner that the resulting spanwise distribution of maximum attainable section lift coefficients of the three or more controlled sections forms a curvilinear polygon enveloping a curve representing the spanwise distribution of section lift coefficients prevailing at the maximum attainable lift coefficient of the lifting surface, for a given planform and discarding the effect of any material amount of aerodynamic washin, and that the said polygon representing the resulting spanwise distribution of maximum attainable section lift coefficients be so shaped that the first intersection with the curve representing the spanwise distribution of prevailing section lift coefficients occurs in that interval of spanwise stations for which stall inception is to be obtained.

3. A lifting surface with three or more controlled fluid-foil sections, in which the first section with a small mean-line camber and greatest thickness ratio is located at the root, the second section with greater mean-line camber and smallest thickness ratio is located at the fluid-dynamically effective tip, and the third or additional fluid-foil sections are located at stations interjacent between the root and the tip, wherein the values of the thickness ratio of the interjacent fluid-foil sections are greater than the values of the thickness ratio obtainable at the respective spanwise stations by means of straight-line fairing between the fluid-foil section located at the root of the lifting surface and the fluid-foil section located at the tip of the lifting surface, and wherein the mean-line camber of one or more of the interjacent fluid-foil sections exceeds the mean-line camber of the more highly cambered tip section.

4. A lifting surface with three or more controlled fluid-foil sections, in which the first section with a small mean-line camber is located at the root, the second section with greater mean-line camber is located at the fluid-dynamically effective tip and the third or additional fluid-foil sections are located at stations interjacent between the root and the tip, wherein the values of the thickness ratio of the interjacent fluid-foil sections are at variance with the values of the thickness ratio obtainable at the respective spanwise stations by means of straight-line fairing between the fluid-foil section located at the root of the lifting surface and the fluid-foil section located at the tip of the lifting surface, and wherein the mean-line camber of one or more of the interjacent fluid-foil sections exceeds the mean-line camber of the more highly cambered tip section, said three or more controlled fluid-foil sections having values of the mean-line camber and the thickness ratio selected in such manner that the resulting spanwise distribution of maximum attainable section lift coefficients of the three or more controlled sections forms a curvilinear polygon enveloping a curve representing the spanwise distribution of section lift coefficients prevailing at the maximum attainable lift coefficient of the lifting surface, for a given planform and discarding the effect of any material amount of aerodynamic washin.

5. A lifting surface with three or more controlled fluid-foil sections adapted to provide stall inception within a predetermined interval of spanwise stations, in which the first section with a small mean-line camber is located at the root, the second section with greater mean-line camber is located at the fluid-dynamically effective tip, and the third or additional fluid-foil sections are located at stations interjacent between the root and the tip, wherein the values of the thickness ratio of the interjacent fluid-foil sections are at variance with the values of the thickness ratio obtainable at the respective spanwise stations by means of straight-line fairing between the fluid-foil section located at the root of the lifting surface and the fluid-foil section located at the tip of the lifting surface, and wherein the mean-line camber of one or more of the interjacent fluid-foil sections exceeds the mean-line camber of the more highly cambered tip section, said three or more controlled fluid-foil sections having values of the mean-line camber and the thickness ratio selected in such manner that the resulting spanwise distribution of maximum attainable section lift coefficients of the three or more controlled sections forms a curvilinear polygon enveloping a curve representing the spanwise distribution of section lift coefficients prevailing at the maximum attainable lift coefficient of the lifting surface, for a given planform and discarding the effect of any material amount of aerodynamic washin, and that the said resulting spanwise distribution of maximum attainable section lift coefficients be so shaped that the first

intersection with the spanwise distribution of prevailing section lift coefficients occurs in that interval of spanwise stations for which stall inception is to be obtained.

6. A lifting surface with three or more controlled fluid-foil sections, and having a highest actually prevailing section lift coefficient at a predetermined spanwise station, in which the first section with a small mean-line camber is located at the root, the second section with greater mean-line camber is located at the fluid-dynamically effective tip, and one of the interjacent fluid-foil sections is located near a spanwise point where a tangent to the inboard portion of the curve representing the spanwise distribution of actually prevailing section lift coefficients, for a given planform and discarding the effect of any material amount of aerodynamic washin, intersects a substantially horizontal tangent to the highest point of the same curve, wherein the values of the mean-line camber of the interjacent fluid-foil sections are greater than the values of the mean-line camber obtainable at the respective spanwise stations by means of straight-line fairing between the fluid-foil section located at the root of the lifting surface and the fluid-foil section located at the tip of the lifting surface, and wherein the mean-line camber of one or more of the interjacent fluid-foil sections exceeds the mean-line camber of the more highly cambered tip section.

7. A lifting surface with three or more controlled fluid-foil sections, and having a highest actually prevailing section lift coefficient at a predetermined spanwise station, in which the first section with a small mean-line camber and greatest thickness ratio is located at the root, the second section with greater mean-line camber and smallest thickness ratio is located at the fluid-dynamically effective tip, and one of the interjacent fluid-foil sections is located near a spanwise point where a tangent to the inboard portion of a curve representing the spanwise distribution of actually prevailing section life coefficients, for a given planform, and discarding the effect of any material amount of aerodynamic washin, intersects a substantially horizontal tangent to the highest point of the same curve, wherein the values of the thickness ratio of the interjacent fluid-foil sections are greater than the values of the thickness ratio obtainable at the respective spanwise stations by means of straight-line fairing between the fluid-foil section located at the root of the lifting surface and the fluid-foil section located at the tip of the lifting surface, and wherein the mean-line camber of one or more of the interjacent fluid-foil sections exceeds the mean-line camber of the more highly cambered tip section.

8. A lifting surface with three or more controlled fluid-foil sections, and having a highest actually prevailing section lift coefficient at a predetermined spanwise station, in which the first section with a small mean-line camber is located at the root, the second section with greater mean-line camber is located at the fluid-dynamically effective tip, and two of the interjacent fluid-foil sections are located respectively near the spanwise station of highest actually prevailing section lift coefficient and near a spanwise point where a tangent to the inboard portion of a curve representing the spanwise distribution of actually prevailing section lift coefficients, for a given planform and discarding the effect of any material amount of aerodynamic washin, intersects the horizontal tangent to the highest point of a substantially same curve, wherein the values of the mean-line camber of the interjacent fluid-foil sections are greater than the values of the mean-line camber obtainable at the respective spanwise stations by means of straight-line fairing between the fluid-foil section located at the root of the lifting surface and the fluid-foil section located at the tip of the lifting surface, and wherein the mean-line camber of one or more of the interjacent fluid-foil sections exceeds the mean-line camber of the more highly cambered tip section.

9. A lifting surface with three or more controlled fluid-foil sections, and having a highest actually prevailing section lift coefficient at a predetermined spanwise station, in which the first section with a small mean-line camber and greatest thickness ratio is located at the root, the second section with greater mean-line camber is located at the fluid-dynamically effective tip, and two of the interjacent fluid-foil sections are located respectively near the spanwise station of highest actually prevailing section lift coefficient and near a spanwise point where a tangent to the inboard portion of a curve representing the spanwise distribution of actually prevailing section lift coefficients, for a given planform and discarding the effect of any material amount of aerodynamic washin, intersects a substantially horizontal tangent to the highest point of the same curve, wherein the values of the thickness ratio of the interjacent fluid-foil sections are greater than the values of the thickness ratio obtainable at the respective spanwise stations by means of straight-line fairing between the fluid-foil section located at the root of the lifting surface and the fluid-foil section located at the tip of the lifting surface, and wherein the mean-line camber of one or more of the interjacent fluid-foil sections exceeds the mean-line camber of the more highly cambered tip section.

10. A lifting surface with three or more controlled fluid-foil sections, in which the first section with a small mean-line camber and greatest thickness ratio is located at the root, the second section with greater mean-line camber and smallest thickness ratio is located at the fluid-dynamically effective tip, and the third or additional fluid-foil sections are located at stations interjacent between the root and the tip, wherein the values of the thickness ratio of the interjacent fluid-foil sections are smaller than the values of the thickness ratio obtainable at the respective spanwise stations by means of straight-line fairing between the fluid-foil section located at the root of the lifting surface and the fluid-foil section located at the tip of the lifting surface, and wherein the mean-line camber of one or more of the interjacent fluid-foil sections exceeds the mean-line camber of the more highly cambered tip section.

11. A lifting surface with three or more controlled fluid-foil sections, and having a highest actually prevailing section lift coefficient at a predetermined spanwise station, in which the first section with a small mean-line camber and greatest thickness ratio is located at the root, the second section with greater mean-line camber and smallest thickness ratio is located at the fluid-dynamically effective tip, and one of the interjacent fluid-foil sections is located near a spanwise point where a tangent to the inboard portion of a curve representing the spanwise distribution of actually prevailing section lift co-

efficients, for a given planform and discarding the effect of any material amount of aerodynamic washin, intersects a substantially horizontal tangent to the highest point of the same curve, wherein the values of the thickness ratio of the interjacent fluid-foil sections are smaller than the values of the thickness ratio obtainable at the respective spanwise stations by means of straight-line fairing between the fluid-foil section located at the root of the lifting surface and the fluid-foil section located at the tip of the lifting surface, and wherein the mean-line camber of one or more of the interjacent fluid-foil sections exceeds the mean-line camber of the more highly cambered tip section.

12. A lifting surface with three or more controlled fluid-foil sections, and having a highest actually prevailing section lift coefficient at a predetermined spanwise station, in which the first section with a small mean-line camber and greatest thickness ratio is located at the root, the second section with greater mean-line camber and smallest thickness ratio is located at the fluid-dynamically effective tip, and two of the interjacent fluid-foil sections are located respectively near the spanwise station of highest actually prevailing section lift coefficient and near a spanwise point where a tangent to the inboard portion of a curve representing the spanwise distribution of actually prevailing section lift coefficients, for a given planform and discarding the effect of any material amount of aerodynamic washin, intersects a substantially horizontal tangent to the highest point of the same curve, wherein the values of the thickness ratio of the interjacent fluid-foil sections are smaller than the values of the thickness ratio obtainable at the respective spanwise stations by means of straight-line fairing between the fluid-foil section located at the root of the lifting surface and the fluid-foil section located at the tip of the lifting surface, and wherein the mean-line camber of one or more of the interjacent fluid-foil sections exceeds the mean-line camber of the more highly cambered tip section.

MAURICE A. GARBELL.

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No. 12885.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CONSOLIDATED VULTEE AIRCRAFT CORPORATION and AMERICAN AIRLINES, INC.,

Appellants,

vs.

MAURICE A. GARBELL, INC., and GARBELL RESEARCH FOUNDATION,

Appellees.

BRIEF OF MAURICE A. GARBELL, INC., AND GARBELL RESEARCH FOUNDATION.

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No. 12885.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Consolidated Vultee Aircraft Corporation and American Airlines, Inc.,

Appellants,

vs.

Maurice A. Garbell, Inc., and Garbell Research Foundation,

Appellees.

BRIEF OF MAURICE A. GARBELL, INC., AND GARBELL RESEARCH FOUNDATION.

Appellants, Consolidated Vultee Aircraft Corporation and American Airlines, Inc., have appealed from the judgment of the District Court adjudging valid and infringed claims 1, 2, 3, 5, 6 and 12 of the Maurice A. Garbell patent No. 2,441,758.

The structure found to infringe these claims is the convair Liner, Consolidated Vultee Model 240 aircraft, manufactured and sold by appellant, Consolidated Vultee Aircraft Corporation, and used by appellant, American Airlines, Inc.

Jurisdiction.

The District Court has jurisdiction under the Patent Laws (Judicial Code 24, 28 U. S. C. A. 41(7)). This Court has jurisdiction of this appeal (Judicial Code 129, 28 U. S. C. A. 227). The appeal was timely.

Statement of the Case.

The Garbell patent relates to an invention of a fluid-foil lifting surface which, for the purposes of the trial and on this appeal, more specifically can be called an aircraft wing or lifting surface. The invention is described by Dr. Garbell in the patent in suit [p. 1, colm. 1, line 53, to p. 1, colm. 2, line 3, R. 605-616]:

> "The general object of this invention is the attainment of good stalling characteristics of lifting surfaces, said good stalling characteristics being achieved by the employment of three or more controlled fluid-foil sections, 1, 2, and 3, selected according to the method explained in the subject specification of this invention, * * *."

In an airplane wing certain cross-sectional geometric shapes, called airfoils, are used to produce lift by that wing [R. 166-168]. The lift is primarily produced by accelerating the flow of air over the upper surface of the wing in relation to the average speed of the wing through the surrounding air. As long as this flow of air over the upper surface of the wing is smooth and not turbulent, lift will be produced by that wing. If the speed of the aircraft is decreased below a minimum speed by heading the aircraft upwardly and shutting down the power, the air flow over the upper surface becomes turbulent with the result that the speed of the passage of the air over the

top side of the wing drops, causing a loss of lift, commonly referred to as a "stall" [R. 169-172].

It was uncontrovertedly shown to the District Court that there were three types of stalls known to the aircraft business prior to the invention of Dr. Garbell. These three types of stalls are fully described by the uncontroverted testimony of Dr. Garbell and are:

1. Tip Stall:

A tip stall in which the flow of air over the upper surface of a wing first becomes turbulent at the outer end or tip of the wing, which turbulent flow destroys the effectiveness of the control surfaces (ailerons) which are located there [R. 539]. In this type of stall the aircraft is substantially uncontrollable at the first inception of the stall and will roll over and fall. There is no stall warning, and the aircraft continues to nose up toward a complete loss of lift and control [R. 171-176, Exhibit 4].

2. Deep Mid-Semispan Stall:

A deep mid-semispan[1] stall in which the flow of air over the upper surface of the wing first becomes turbulent near mid-semispan, that is, substantially half way between the root[2] and the tip of either wing, and the stall deepens and develops fore-and-aft across the wing without a material spread of the turbulence to-

---

[1]Semispan—a wing is ordinarily spoken of as comprising the entire lifting element from one tip to the other and the term "semispan" refers to half of the wing or from the fuselage to the wing tip.

[2]The term "root" means the center of the whole wing, and more commonly, that portion adjacent the fuselage.

ward the root of the wing. In this type the stall warning is inadequate, and the aircraft continues to nose up until the stall is complete and the aircraft becomes wholly uncontrollable [R. 176-178, Exhibit 5].

3. Root Stall:

A root stall in which the flow of air over the upper surface of a wing first becomes turbulent over a narrow area adjacent the fuselage and then spreads fore-and-aft across the wing. In this type of stall an extremely rough air flow hits the tail, setting up a tail shake and great structural stresses while the aircraft is flying at a speed substantially higher than that at which loss of lift occurs. As this stall becomes more intense the rough air flow increases until the pilot loses control of the tail surfaces or the tail surfaces are destroyed [R. 178-182, Exhibit 6].

All of these prior types of stalls create undesirable stall characteristics. If one of these prior types of stalls occurred in an aircraft, the aircraft would become uncontrollable unless the pilot took corrective measures immediately upon the first inception of the stall. It was the object of Dr. Garbell's invention of the patent in suit to construct a wing with more desirable stalling characteristics. He accomplished this by the construction of a wing which did not have any of the prior types of stalls, but one which gave an aircraft a stall that left the aircraft substantially controllable throughout the stall and would give the pilot a good stall warning before the stall became critical [R. 182-185].

The District Court Held That a Wing Constructed in Accordance With the Teaching of the Garbell Patent Solved a Problem Long Existing in the Aircraft Industry.

The problem which Dr. Garbell solved was to provide a wing which would have neither a tip stall nor a root stall nor a deep mid-semispan stall, but a stall which would give a timely warning to the pilot so that he could take corrective measures to get the aircraft out of the stall, and if he ignored this warning, the aircraft would resist increasingly any further action by the pilot that might aggravate the stall, or the pilot would still be able to get successfully out of the stall if the stall had progressed further toward a complete loss of lift [Garbell Patent, p. 3, colm. 5, lines 51-65, R. 183-184].

The record is full of descriptions of the dangers of a tip stall [R. 169-176, 539, 867, 905-906]. The record is full of the many attempts to prevent a tip stall [R. 176-182, 510, 578, 868, 905-906]. The record shows that there were two schools of thought on how to prevent a tip stall [R. 176-182]. As described in the unchallenged testimony of Dr. Garbell, these schools constituted (1) the root stall which had many dangers and (2) the deep mid-semispan stall which was the less dangerous of the remedies, but had many deficiencies, such as loss of efficiency (load carrying ability) and a lack of warning to the pilot that the aircraft was in a dangerous condition and longitudinally unstable [R. 176-182].

There were also palliative means of preventing tip stall widely used by many aerodynamicists. These were the use of "spoilers" which were employed to disturb the air flow and cause turbulence over the portion of the wing just before tip stall commences [R. 182, 574, 576-579, 590].

Spoilers did not overcome the dangers of tip stalls but they provided the pilot with warnings that the aircraft was entering into a dangerous condition and that he should immediately remedy the same. Spoilers had the effect of seriously decreasing the speed and load carrying capacity of the aircraft. They were merely remedies used to make an otherwise dangerous aircraft usable [R. 578, 590].

All of these schools of thought on how to overcome tip stall were discarded by Dr. Garbell and an entirely new approach to the problem was evolved by him as described and set forth in the patent in suit along with the mechanical construction of a wing which solved the problem.

The Garbell Stall.

The record shows and there is no evidence to the contrary that a wing constructed in accordance with the patent in suit has a totally new type of stall, which we shall hereinafter call the "Garbell Stall."

The Garbell Stall is one in which the flow of air over the upper surface of the wing first becomes turbulent over a large spanwise area of the lifting surface inboard of the lateral control devices and such turbulence spreads inboardward therefrom characterized by a timely but not excessive stall warning through tail shake at a speed sufficiently but not excessively above the minimum level flying speed, together with a substantial decrease in elevator control effectiveness as the aircraft approaches the stall, a restoring pitching motion, nose down, with the absence of any excessive rolling motion prior to such restoring pitching motion, and followed by the restoration of *airspeed* necessary for sustained flight with only a small

loss in altitude [Garbell patent, p. 3, colm. 5, lines 7-12 and lines 36-65; R. 182-185, 197-199; Exhibit 7, and Find. of Fact XII, R. 47].

The Structure Patented by Garbell to Achieve the Garbell Stall.

The patent in suit specifically describes that in order to achieve the Garbell Stall the semispan of a wing should have three or more control sections[3] and these three control sections must have a definite relationship to one another. This relationship is:

1. The root control section must have the least mean-line camber[4] and the greatest thickness ratio[5] of the *entire* wing;

2. The tip control section must have the greatest mean-line camber and the smallest thickness ratio of the *entire* wing; and

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[3]A control section is the cross-sectional shape of a wing obtained by the intersection of the wing with a vertical fore-and-aft plane located at a particular spanwise location between the root and the tip of a wing. From a given set of control sections other airfoil sections are derived by means of drawing straight lines between points on the one control section to corresponding points on a control section located at another spanwise point of the wing. Sections lying between two control sections are then referred to as faired sections obtained by straight-line fairing.

[4]*Mean-Line Camber:* In an airfoil section there is a mean line half way between the top curve and the bottom curve of the airfoil. Mean-line camber is the amount of curvature of the mean line [R. 167-168] and the greater the mean-line camber the more lift the particular section will have at a given angle of attack. For all practical considerations as far as this case is concerned, mean-line camber of camber is synonymous with the arch of the wing or airfoil section. Hereinafter in this Brief, for brevity Appellees will use the term "Camber" meaning "Mean-Line Camber."

[5]*Thickness Ratio*: is the maximum thickness of an airfoil section divided by its chord length. Chord length is the fore-and-aft length of an airfoil section.

3. There must be at least one interjacent control section between the root and the tip and this section must have a greater mean-line camber than the root section and a smaller mean-line camber than the tip section, and the mean-line camber of the interjacent control section should be greater than that which would be derived from straight-line fairing from the root section to the tip section, and the thickness ratio of the interjacent control section should be smaller than that of the root section and greater than that of the tip section, but smaller than would be derived from straight-line fairing from root section to tip section [Garbell patent, p. 2, colm. 4, lines 31-67; R. 198-199, 205-206].

Defenses Urged by Appellants at the Trial.

The defenses set up in the trial of this cause were:

1. Anticipation of the patent in suit.
2. Lack of invention of the patent in suit.
3. Defendants did not infringe the patent in suit.
4. Defendants had an express or an implied license under the patent in suit.

The District Court held that the Garbell patent described a new and novel invention [R. 38, Find. of Fact XIV, XVI; R. 48; Concl. of Law II, R. 56], that none of the prior art anticipated that invention [R. 38, Find. of Fact XV, XVIII, XIX, XX, XXI, R. 48-50; Concl. of Law II, R. 56], and that the Convair Liner, Consolidated Vultee Aircraft Corporation Model 240 aircraft, infringed claims 1, 2, 3, 5, 6 and 12 of the patent in suit [R. 38-39, Find. of Fact XXV, XXVI, R. 51; Concl. of Law III, IV, R. 56-57].

The District Court also held that there was no license to the defendants, either express or implied [R. 39-43; Find. of Fact XXXIII, XXXIV, R. 53].

Dr. Garbell's invention comprised the use of more camber at the tip than at the root and more camber at the interjacent sections than at the root but less than at the tip, with the camber at the interjacent section being greater than obtainable by straight-line fairing from root to tip, and having less thickness ratio at the tip than at the root and a greater thickness ratio at an interjacent point than at the tip but less than at the root and with a smaller thickness ratio than would be obtainable by straight-line fairing from root to tip.

Appellants have relied on published reports or alleged prior users. All of this prior art fails to describe or use the camber and thickness ratios described as necessary in the patent in suit [R. 430, 431-435, 438-440, 442, 239-242, 284].

The problem of tip stall is most serious in wings having a high planform taper [Exhibit XXX, p. 517; R. 867], *i. e.,* a substantially longer root chord than tip chord, more than two and one-half (2½) to one (1) [R. 226]. By using a highly tapered wing the structural weight of the wing can be greatly reduced, thereby increasing the load carrying capacity of the aircraft having the same power [R. 225, 227]; however, the more taper in a wing the more serious the tip stall problem. In fact, prior to the invention of the patent in suit a highly tapered wing, that is, one that is more than two and one-half (2½) to one (1) could not be used safely because of the tip stall problem.

Most of the prior art relied upon by defendant described low tapered wings where the problem of tip stall

was readily overcome by increasing the camber from root to tip and using "wash out,"[6] twisting the wing. The patent in suit is expressly directed at highly tapered wings [Garbell Patent, p. 2, colm. 3, lines 14-19, 66 to colm. 2, line 4].

In creating the Garbell stall, the Garbell patent does not merely increase the camber from root to tip, which is known as a two-section wing, but uses a particular conformation of three-section wing, which is not taught or described in any of this prior art and this Garbell wing achieves a stall function which is not possible with a mere increase of the camber from root to tip, with or without "washout" [R. 442].

There is no contrary evidence in the record to the testimony of Dr. Garbell that all of this prior art, both the published reports and alleged prior users, describes wings which have either a tip stall, deep mid-semispan stall or a root stall, or were not usable in high speed aircraft [R. 426, 442]. In fact, some of these articles actually confirm the testimony of Dr. Garbell in that they describe the dangers of the tip stall in highly tapered wings and attempt to outline a remedy therefor [R. 905-907], but they do not describe in any way the Garbell Stall nor do they have the structure which would have produced the Garbell Stall [R.

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[6]*Wash-Out:* is a way of twisting a wing so that the tip portion of that wing has a lower angle of attack than the root portion of the wing. Wash-out reduces the lifting force acting upon the tip, but it increases the drag or air resistance of the total wing. Wash-out is merely another expedient to make an otherwise dangerous aircraft usable [R. 901, colm. 2, 906].

442]. They disclose the problem but do not offer a successful remedy. It is fundamental that a successful invention is not to be defeated by earlier failures.

Carnes Artificial Limb Co. v. Dilworth Arm Co., 273 Fed. 838 at 841;

Crown Cork & Seal Co. v. Ideal Stopper Co., et al., 123 Fed. 666 at 668;

Kirchberger, et al. v. American Acetylene Burner Co., 124 Fed. 764 at 776, 777;

Walker on Patents, Deller's Ed., Vol. 1, §48, p. 257;

Morey v. Lockwood, 8 Wall. 230.

Defendants Abandoned the Defense of Noninfringement.

Defendants abandoned the defense of noninfringement at the trial of this cause. Dr. Garbell testified to the structure contained in the Convair 240 airliner. He then set forth that he had studied and was thoroughly familiar with the flight test reports of the Convair Liner [compiled by Defendant Consolidated Vultee Aircraft, Exhibit 35] and that the Convair Liner had a Garbell Stall. The Convair 240 airliner has a highly tapered wing, 3:1 [R. 1005]. It has the smallest camber at the root and the greatest at the tip. It has an interjacent section which has a greater camber than that at the root and a smaller camber than that at the tip and the camber at the interjacent section is greater than would be obtained by straight-line fairing. It has the greatest thickness ratio at the root and the smallest thickness ratio at the tip. It has an interjacent section which has a smaller thickness ratio than at the root and a greater thickness ratio than at the tip and a smaller thickness ratio at the interjacent section than would be obtained by straight-line fairing [R. 220-225, 653].

In fact, even counsel for defendants have admitted the infringement of the patent in suit [Exhibit 21, R. 653], wherein defendants state "Claims 1, 2, 3, 5, 6 and 12 appear to be utilized by the Model 240 wing" [R. 227-228]. No testimony was placed in the record by the defendants contrary to any of these statements by Dr. Garbell and the Findings of Fact of the Court are therefore definitely established.

Facts Relating to Defendants' Alleged Claim of License.

The facts relating to defendants' claim of license are not in dispute as there was no contrary evidence offered at any time during the trial to the testimony of Dr. Garbell. These facts are:

In 1937 Dr. Garbell, while at the Milan Institute of Technology in Italy, was in charge of the Soaring Research Institute and was requested to prepare a uniform specification for sailplanes for the Olympic games [R. 160-162]. At that time he realized the deficiencies of all the prior attempts to overcome tip stalls and proceeded to work out a theory of how to overcome this tip stall problem in a sailplane [R. 165-166]. He actually constructed a sailplane known as the Pinguino, which had a stall fundamentally similar in result to the herein described Garbell Stall. The means used in the Pinguino of accomplishing this result were not usable in a powered or high speed aircraft [R. 239-242, 284]. In 1939 Dr. Garbell came to the United States as a resident alien and sought employment in the aircraft industry [R. 163]. While he was en route by steamship to the United States he calculated and worked out a novel construction of a wing for powered aircraft, which novel construction is fully described in the patent in suit. At that time he made drawings,

sketches and calculations which are substantially the same as those later incorporated in the application for the patent in suit [R. 165, 172-190, 199]. These drawings, sketches and calculations were later destroyed as Dr. Garbell did not need them to remember the invention and its construction [R. 183]. As he was a resident alien, employment in the aircraft industry in the United States at the time of his arrival was practically barred, but he did secure employment in aeronautical teaching. During this time (Summer of 1939) he met Dr. Robert C. Platt, who was a leading aerodynamicist for the National Advisory Committee for Aeronautics, at Elmira, New York, where he described and explained the invention set forth in the Garbell patent to Dr. Platt, including all essential elements of the patent in suit, so that Dr. Platt fully understood both the principle of operation and the structure invented by Dr. Garbell. This conversation of Dr. Garbell with Dr. Platt was followed by correspondence between Dr. Garbell and Dr. Platt's superior, Dr. Lewis of N. A. C. A. [R. 199-202]. Dr. Garbell subsequently, in 1939, was employed by the Boeing School of Aeronautics in Oakland, California, where he met and became acquainted with one Harry Bradford Chin, who was teaching Aircraft Design. While so employed Dr. Garbell thoroughly described his invention to Harry Bradford Chin, made drawings and sketches on paper and on a blackboard to explain the invention to Mr. Chin and Mr. Chin fully understood both the principle of operation and the structure invented by Dr. Garbell [R. 202-207].

This Court is bound by a well established rule of law to accept the Findings of Fact of the District Court where there is substantial evidence to support those facts. In the present case the District Court found as a matter of

fact that Dr. Garbell made his invention and disclosed it to others before his employment by the defendant, Consolidated Vultee Aircraft Corporation [Find. of Fact XXXV, XXXVI, R. 53]. There is no evidence in the record in any way challenging the testimony of Dr. Garbell on this subject. Under the rule of evidence, by which this Court and the District Court are bound, these facts are established. The rule of evidence that applies to this case is that of the State of California and is Section 1844, Code of Civil Procedure:

> "§1844. One witness sufficient to prove a fact. The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason."

In 1942 Dr. Garbell, having become a citizen of the United States, applied for and secured employment with the defendant, Consolidated Vultee Aircraft Corporation, as an Aeronautical Engineer [R. 211]. Within six weeks thereafter Dr. Garbell attempted to interest the defendant, Consolidated Vultee Aircraft Corporation, in his invention [R. 446]. He actually pestered the officials of the corporation to use his invention. These officials at all times rejected the use of the invention [R. 234-237, 261, 278-279, 301-302, 313-314, 324-326, 362, 461, 666, 40-43; Find. of Fact XXXVI, XXXVII, XLIII; R. 53-55].

The officials and superiors of Dr. Garbell at Consolidated Vultee Aircraft Corporation referred to his invention in derogatory terms [R. 236, 301-302, 311; Find. of Fact XIII; R. 48]. At no time did the corporation offer to use the invention and at no time did the corporation use the invention until long after Dr. Garbell had left its em-

ployment [R. 236-237, 249, 255-257, 326, 418, 457-459; Find. of Fact XL, XLV; R. 54, 55].

A very graphic illustration of the continued rejection of the Garbell invention is presented by Exhibit 25 (see original exhibit) whereon an officer or agent of Consolidated Vultee Aircraft Corporation wrote in longhand "Not at this time." This rejection was made more than two years after Dr. Garbell first tried to interest the defendant in his invention. Even then the defendant made no claim of title or of license; in fact, defendant never made such a claim [Find. of Fact XLII, R. 54] until almost a year after Dr. Garbell had left the employment of defendant and had initiated correspondence with defendant regarding a possible settlement for the infringement of his rights [R. 461].

The aircraft held to infringe the patent in suit was designed and manufactured after Dr. Garbell left the defendant's employment [R. 325, 418, 458-459; Find. of Fact XL; R. 54]. He did not aid in its design or construction. Dr. Garbell received no remuneration for his invention from the defendant corporation [R. 282, 362; Find. of Fact XLI; R. 54], or even an acknowledgment that it was his invention or that they were using it [R. 234-238].

Dr. Garbell did incorporate his invention in suggestions that he made to the defendant [Find. of Fact XXXVII, R. 53], but at no time was there any time or expense of the defendant expended in development, adapta-

tion or modification of his invention [R. 259, 280, 461-462; Find. of Fact XXXVIII, XXXIX; R. 53-54].

All of these facts supported the Trial Court's opinion that there was no express or implied license either by way of the Invention Agreement [Exhibit 16] or because of the alleged development of the invention through the alleged use of the defendant corporation's time and expense, because the invention was made prior to the employment of Dr. Garbell by defendant and none of the corporation's time and expense was used in developing the invention [Find. of Fact XXXIII, XXXVIII, XXXIX; R. 53-54].

Defendants' Motion for a New Trial.

Defendants made a motion for a new trial which was denied by the District Court, and they have appealed from this denial of a new trial. The grounds for this new trial were:

1. Surprise at the trial which ordinary prudence could not have guarded against;
2. Newly discovered evidence;
3. Insufficiency of the evidence to establish infringement. [R. 65.]

The alleged surprise was "Defendants were wholly surprised by Garbell's unexpected testimony" (Apps. Op. Br. p. 59), and, secondly, that they knew nothing of Harry Bradford Chin until the trial and, therefore, they should be allowed to call him to testify, and, third, that

the District Court misinterpreted exhibits and testimony and, therefore, they should be allowed to call further witnesses to explain the testimony and exhibits. These new witnesses being known at the trial and some being employees of Appellant, Consolidated Vultee Aircraft Corporation, and not produced at the trial, the Court properly overruled the motion.

It is not newly discovered evidence when the name of a possible witness has been named in the Court room and a party fails to ask leave of the Court to take a deposition or to call that witness. All of the facts to be testified to by these new witnesses should have been foreseen and prepared.

The last ground for a motion for a new trial was that the Court had improperly applied the law in its Findings of Fact when it stated that there was no evidence adduced at the trial to negate a finding that the defendants infringed the patent in suit. As heretofore set forth, Dr. Garbell completely described the geometrical configuration of the accused 240 aircraft and showed that this geometry was the same as that patented. He further testified that from a study of the flight tests and C. A. A. reports [Ex. 35], furnished Appellees by Appellants, that the stall of the Convair 240 was the same as the Garbell Stall. The District Court properly held that the burden of proof shifted from the plaintiffs, as they had established a *prima facie* case of infringement, to the defendants to negate the proof of Dr. Garbell, and they made no attempt to do so.

SUMMARY OF ARGUMENT.

1. THE PATENT IN SUIT TEACHES AN INVENTION COMPRISING A NEW COMBINATION OF ELEMENTS WHICH PRODUCES A NEW AND HIGHLY USEFUL RESULT NOT KNOWN TO THE PRIOR ART.

a. The Martin B-26 does not anticipate the patent in suit nor achieve the same result as the combination of the patent in suit.

b. The Martin P. B. M., the articles [Exhibits AAA and SSS], and the Vultee Vengeance do not anticipate the patent in suit nor achieve the same result as the combination of the patent in suit.

c. The Royal Aeronautical Society and Zien articles [Exhibits WW and XX] do not anticipate the patent in suit nor achieve the same result as the combination of the patent in suit.

d. The N. A. C. A. reports and notes [Exhibits XXX, UU and R. 868], and the article [Exhibit CCC], describe the conventional two-section wing prior to the Garbell invention and do not anticipate or describe the result of the Garbell invention.

e. There was no proof of the construction of any of the Curtiss-Wright models other than the one described in Exhibit VV, and none of these aircraft includes a Garbell Wing or achieves the result of the Garbell invention.

2. THE PINGUINO DOES NOT DESCRIBE THE COMBINATION OF THE PATENT IN SUIT.

3. THE CLAIMS IN SUIT PARTICULARLY POINT OUT AND DISTINCTLY CLAIM THE PART, IMPROVEMENT OR COMBINATION COMPRISING THE GARBELL INVENTION.

4. IT WAS CONCLUSIVELY SHOWN BY THE TESTIMONY OF DR. GARBELL AND K. WARD THAT THE CONVAIR 240 INFRINGED THE PATENT IN SUIT AND THAT IT HAD THE SAME STRUCTURE AS THE PATENT IN SUIT AND ACHIEVED THE SAME RESULT AS THE PATENT IN SUIT.

5. THE APPELLANTS DO NOT HAVE ANY LICENSE, EITHER EXPRESS OR IMPLIED, UNDER THE PATENT IN SUIT.

a. Dr. Garbell made the invention described in the patent in suit long prior to his employment by the defendant, Consolidated Vultee Aircraft Corporation.

b. The Invention Agreement [Exhibit 16] does not give an express license to the Appellants as the invention was made prior to the employment of Dr. Garbell by Consolidated and this was recognized at all times by the conduct of the Appellant.

c. There is no implied license or shop right under the patent in suit as the Appellants never expended time or money in perfecting, testing, developing, adapting or modifying the invention of the patent in suit, and never expended time or money in constructing aircraft or operating models with the knowledge and consent of Dr. Garbell, or during the employment of Dr. Garbell.

6. THE TRIAL COURT PROPERLY DENIED DEFENDANTS' MOTION FOR A NEW TRIAL.

7. APPELLANTS HAVE INSERTED EVIDENCE IN THEIR OPENING BRIEF WHICH WAS NOT BEFORE THE TRIAL COURT.

ARGUMENT.

The Garbell invention comprises the creation of a new stalling characteristic, namely, that the stall should initiate inboard of the lateral control surfaces and should spread inwardly toward the root of the wing, thereby producing an adequate tail shake and causing the aircraft to nose down without any appreciable spread of the turbulence over the aileron and without an initial deep chordwise (fore-and-aft) spread [Garbell Patent p. 3, colm. 5, lines 7-12, and 37-65; R. 182-185, 197-199; Find. of Fact [XI, XII, XIV, XV; R. 47-48]. The testimony of Dr. Garbell [R. 182-185, 197-199] is unchallenged although many alleged experts testified for Appellants. To accomplish this novel stall Dr. Garbell provides a specific arrangement of camber and thickness ratio. The smallest camber should be at the root of the wing, the greatest camber at the tip and that there must be a third or interjacent section between the root and tip which has a larger camber than the root and smaller camber than the tip, but this interjacent section must have greater camber than would be obtainable by straight-line fairing. The thickness ratios of the wing sections are opposite in variation to the camber variation [Garbell Patent p. 2, colm. 4, lines 31-67, claims 1, 2, 3, 5, 6, 12; R. 192-199; Find. of Fact VIII, IX, X; R. 45-46]. Again this testimony of Dr. Garbell [R. 192-199] is unchallenged.

Prior Art.

Martin B-26.

None of the prior art referred to in Appellants' Brief discloses the Garbell Stall or the Garbell geometrical configuration of a wing. One of these prior art wings has no camber (0%) in an entire wing panel extending from the root (0%) to an interjacent section (0%). A contiguous interjacent section has camber (1.05%) and the tip section has more camber (2.25%) than the cambered interjacent section (1.05%). Obviously this wing did not have the smallest camber at the root as the interjacent section has the same camber [R. 845]. This was the Martin B-26.

The B-26 admittedly had a serious tip stall, even with spoilers added [R. 518-519] and this was called by its own designer an unsatisfactory stalling aircraft [R. 560].

Martin P.B.M., Exhibits AAA and SSS and Vultee Vengeance.

Another aircraft upon which the Appellants have relied was the Martin P. B. M. The P. B. M. had a constant camber from the root (2%) to the gull (2%), which is the interjacent section, and then the camber increased from that interjacent section (2%) to the tip (3.84%) [R. 525-526, 859]. In other words, all sections between the root and interjacent section had the same camber (2%) [R. 525]. The interjacent section did not have greater camber than the root; hence, the smallest camber was not at the root [R. 526]. This aircraft ad-

mittedly as so built had a typical tip stall and the use of spoilers was required to make it usable [R. 574, 576, 589-590].

Another aircraft set up as an anticipation was that described in Exhibits AAA and SSS and known as the "Wippsterz." In this aircraft there is a constant camber from the root (2%) to the mid-semispan (2%) and *then* the camber increases to the tip (4%) [R. 438]. This is identically the same camber arrangement as used in the P. B. M. except as to quantities. This aircraft too had a dangerous stall [R. 438-439].

Another prior art aircraft set up in Appellants' Brief was the Vultee Vengeance described in Exhibits K and LLL. This aircraft was another example of the school of thought of which the P. B. M. and Wippsterz are two. This aircraft likewise had a constant camber starting at the root (1.4%) and running to an interjacent section (1.4%), and then an increase in camber to the tip (2%) [R. 335]. This is identically the same camber arrangement used in the P. B. M. and Wippsterz except as to quantities.

None of the afore described aircraft has the small*est* camber at the root. The interjacent section has less camber than straight-line fairing. None have the Garbell stall. All have unsatisfactory stall characteristics.

Royal Aeronautical Society and Zien Article.

In the literature set up as prior art by Appellants are advocates of a method of overcoming the tip stall, namely, Royal Aeronautical Society [Deft. Exhibit WW, R. 903-910] and the article by Zien [Exhibit XX, R. 911-937]. Both of these articles teach that to prevent a tip stall the camber should be the least at the root but a greater

camber is used at an interjacent section and the same camber as at the interjacent section is used at the tip. This does not give a smaller camber at the interjacent section than at the tip, but identically the same camber. Therefore the tip does not, as in the patent in suit, have the greatest camber [R. 400-401, 433-435, 469-470, 909]. The record is singularly void in showing the use of this type of structure described in Exhibits WW and XX in any aircraft. The reason is readily understood when it is realized that this type of structure would give the deep root stall described by Dr. Garbell which produces such a violent tail shake and premature loss of lift that serious structural stresses would be set up which at times would actually tear the tail from the aircraft [R. 178-182].

N. A. C. A. Two-section Wing Reports.

Some of the earliest attempts to prevent tip stalling are disclosed in N. A. C. A. Reports [R. 627, Exhibit UU; R. 703, Exhibit XXX] and N. A. C. A. Note [R. 868]. In these exhibits all that is disclosed is a two-section wing. A two-section wing is one with straight-line fairing from root to tip [R. 427-430, 868, Exhibit XXX, pp. 517-518]. There is no description of the three or multi-control section wing in any of these exhibits. None of the wings described in these exhibits have the Garbell Stall. In fact, all that is described is attempts to move the tip stall from the tip to some other very narrow location on the wing.

To the N. A. C. A. notes and reports just referred to can be added Exhibit CCC [R. 950]. All that this exhibit describes is the problem of tip stalling, not its cure. It says that if some unspecified arrangement of camber and thickness is used tip stalling may be prevented, but it does not say what camber arrangement is to be used or what

a desirable stall characteristic is, nor does it relate one with the other [R. 439-440, 950]. This Exhibit CCC, when taken with the other exhibits, shows a true picture of the history and status of the art in wing design prior to the Garbell invention. It shows that many persons recognize the dangers of tip stall, root stall, etc., and that all of them were working on the problem. But none of this prior art discloses the actual Garbell arrangement of camber and thickness ratio, or even suggests the Garbell Stall. It is significant that the accused aircraft, the Convair 240, does not have any of these prior geometrical configurations or stall remedies (spoilers) and does not have any of these stall characteristics, but has the identical geometrical configuration and stall characteristics described and claimed in the Garbell patent [R. 220-225, 227-228, 442, 653].

Curtiss-Wright Models 19L, 21B and 23.

In an attempt to prove prior use, the Appellants introduced evidence allegedly relating to three aircraft made by the Curtiss-Wright Corporation. It is the contention of Appellants that these aircraft each had a wing configuration possessing a camber ratio similar to that set forth in the Garbell patent.

The sole witness testifying on this subject for Appellants was Oldendorph, a young man of thirty-three, who stated he was employed by defendant, Consolidated Vultee Aircraft Corporation, as an engineer, without further explanation or elaboration [R. 377]. Oldendorph's testimony discloses that from June to September, 1936, he was employed by Curtiss-Wright [R. 378]. In what capacity is not stated, but he would then have been eighteen or nineteen years old. According to his statement, Oldendorph

was again employed by Curtiss-Wright from June, 1937, to September, 1945 [R. 378], and in 1940 worked on the design of the center section—not the end or tip section—on a wing for the Model 21B aircraft [R. 396]. It is to be noted that Oldendorph did not testify that he had anything to do with either the Model 23 or the Model 19L in any capacity whatsoever. Hence we may properly conclude, as the evidence discloses, that Oldendorph was referring to what he had heard or read when he attempted to describe the wing configuration of the Model 23 or 19L.

According to Oldendorph, the Model 21B used exactly the same wing geometry as the Model 23 [R. 383]. *How does he know this?* When questioned on direct examination concerning the camber of the wing of the Model 23 in an attempt to show that the tip section thereof had the greatest camber, Oldendorph stated:

> "The camber, if it had been a straight-line fairing from the root to the tip, it would have varied from 0 to, I believe it was, about 3½ or 3.4% at the tip." [R. 380.]

This indefinite and obviously qualified remark is the basis for the positive position taken by Appellants in their Brief that the Curtiss-Wright Models 23 and 21B had a wing with a tip section having a camber of 3.4%.

After saying that the wing on the Model 21B had the same configuration as the Model 23 [R. 383] Oldendorph said that the Model 23 in turn, utilized airfoils developed by Curtiss-Wright on its earlier Model 19L [R. 381]. Again, how does he know this? To lend support to this claim Appellants placed in evidence Exhibit VV [R. 893-902], Exhibit MMM [R. 975-980; Exhibit NNN [R. 981], Exhibit OOO [R. 989-993], Exhibit PPP and Exhibit QQQ.

Exhibit VV, an article written in 1936, describes an aircraft, called Curtiss-Wright "Coupe," having a two-section wing [R. 431], definitely the same type of wing described in Exhibits UU and XXX. The article does not refer to any of the Curtiss-Wright Models 19L, 23 or 21B and does not contain any description of a Garbell Stall or of a three control-section wing. The article likewise does not describe the CW-19 tip airfoil nor its camber or thickness ratio.

The record is devoid of any proof that Exhibits MMM, OOO and PPP were ever published or that they described any aircraft as actually built. They are merely excerpts from private reports proposing possible experiments, long since abandoned, for the use of Curtiss-Wright Corporation and, hence, are not prior art.

Exhibit NNN has no evidentiary value in this case, being some drawing prepared and utilized for the purpose of illustrating a point in Oldendorph's testimony [R. 382].

In seeking to support his statement as to the camber ratios of the Model 23 wing, Oldendorph testified that they were given in Exhibit MMM [R. 378, 391]. Exhibit MMM consists of six photostatic pages arbitrarily selected from a Circular Proposal prepared for Army consideration and apparently consisting of a total of 109 pages [R. 975]. This was a private company proposal and there is no showing that the other 103 pages which Appellants did not introduce in evidence did not contain one or more different wing proposals, any of which may have been used in the Model 23.

Although Oldendorph testified that the airfoil sections were given on page 28A of said Exhibit MMM [R. 392], said Exhibit MMM does not contain page 28A, nor was

such a page introduced in evidence or displayed at the trial. We are forced to conclude that the only reason for failing to place page 28A in evidence is that it showed some other facts than given by the witnesses' memory. After being pressed on the matter and after examining Exhibit MMM, Oldendorph testified:

> "It does not make any statement that I have been able to see here concerning the actual camber value of the CW-19 at the tip." [R. 392.]
>
> "It is not described in numerical value in this report (indicating)." [R. 393.]

The same situation is true of airfoil thickness, for Oldendorph testified that "I do not believe that any actual thickness is given for the CW-19 airfoil in this report." [R. 393.]

Oldendorph then sought support for his statements in Exhibit VV, which was admittedly published three or four years before the Model 23 aircraft was built [R. 395] and read from page 272 thereof [R. 394]. The selection read by Oldendorph refers to a two section wing tapered from root to tip [R. 431], which is totally different from the Garbell patent. Furthermore, Oldendorph even disagreed with the statement he had just read into the record.

> "It describes a wing with maximum camber at the tip, a constant camber from the center line to rib No. 4, and a straight-line variation of camber between rib No. 4 and the maximum camber point at the tip." [R. 395.]

Assuming this statement to be correct, which it is not, it does not disclose a wing having the smallest camber at the root as is called for in the Garbell patent, but a wing similar to the Martin P.B.M.

According to Oldendorph, the modified wing on the Model 19L formed a basis for the wing configuration on the Model 23 and, hence, the Model 21B, and the modified wing of the Model 19L had an airfoil in the tip section of the wing with a mean-line camber of 3.4% [R. 386]. To support this statement, reliance is placed by Appellants on Exhibit OOO [R. 983], which is an intramural report of the Curtiss-Wright Corporation covering some flight test report of the Model 19L before modification and proposed structural changes to be made in the wing. Again, only a few arbitrarily selected pages of the entire report were introduced in evidence by Appellants. An examination of Exhibit OOO (which is dated prior to Oldendorph's employment by Curtiss-Wright) discloses that it does not contain any reference whatsoever to any table from which the airfoil data of the proposed modified wing can be obtained, nor was such a page of said report introduced in evidence or produced in Court.

A final attempt made by Appellants to bolster the claim advanced by them as to the camber of the modified tip section of the Model 19L wing is found in Exhibit ZZZ [R. 998]. *Allegedly* the lower drawing on said exhibit is a correct delineation of the ordinate resulting from the specification forming a part of Exhibit OOO. Exhibit ZZZ was prepared by Appellants and contains at the bottom thereof this statement, "Section derived from ordinate given on Curtiss-Wright Drawing No. 19-03-220." No such drawing as that referred to was introduced in evidence and it most certainly does not form a part of Exhibit OOO, nor does Exhibit OOO contain any specification of ordinates, airfoil sections or cambers.

With reference to Exhibit QQQ, and in referring to the Model 21B, Oldendorph testified that the physical

aerodynamic layout of the wing for the Model 21B was not given therein and that the airfoil sections are not included [R. 396]. He likewise stated that said Exhibit QQQ did not contain any statement as to the (wing) sections of the Model 23.

It is apparent from the record that Oldendorph's testimony is unsupported and that said testimony concerning the Model 23 and the Model 19L is pure and simple hearsay.

Obviously the Trial Court gave little weight to Oldendorph's testimony, and quite correctly so. The Curtiss-Wright Corporation over a long period of time has been and still is in business. Proper and accredited testimony could have been introduced by Appellants through some official or officials of said corporation, either directly or by deposition. Instead of so doing they seek to rely upon the testimony of a witness who is certainly not disinterested inasmuch as he was at the time of the trial an employee of Appellant, Consolidated Vultee Aircraft Corporation, and who was testifying concerning matters taking place some fourteen years prior to the date of trial and when he was a very young man indeed.

It is our opinion that Oldendorph's testimony should be viewed with a great deal of suspicion and we further believe that this is a shining example of the type of testimony so aptly referred to in "The Barbed Wire Case." *The Washburn C. Moen Co. v. The Beat 'Em All Barbed Wire Co.* (1891), 143 U. S. 275 at 284, 36 L. Ed. 154 at 158.

See also:

Smith v. Hall (1937), 301 U. S. 216 at 222, 81 L. Ed. 1049 at 1055;

Deering v. Winona Harvester Works (1894), 155 U. S. 286 at 300, 39 L. Ed. 153 at 159;

Parker v. Stebler (9th Cir., 1910), 177 Fed. 210 at 212.

All of the prior art relied upon by Appellants clearly illustrates that tip stalling, especially in highly tapered wings, was a serious problem in the art of wing design and that many aerodynamicists and companies were working on the problem; that many schemes and systems in the arrangement of camber and thickness ratio were used and that the best that any of these experts were able to do was to patch up a wing with spoilers so that an otherwise dangerous aircraft could be used. All of the art set up by Appellants shows that the trade had long and persistently been seeking in vain for what Dr. Garbell finally accomplished by his particular arrangement of camber; *Forsyth v. Garlock*, 142 Fed. 461 at 463. The fact that others sought a solution to the problem of tip stall and failed whereas Dr. Garbell solved the problem clearly demonstrates the correctness of the District Court's findings that the invention was not anticipated and comprised a new and novel discovery of the highest sort and entitled to the protection of the Patent Laws.

> "A prior patent which fails to solve the problem toward which the inventor's efforts are directed does not anticipate a subsequent patent which successfully solves the problem and effectually accomplishes the desired result." (*Williams Iron Works v. Hughes Tool Co.*, 109 F. 2d 500, 510 (C. C. A. 10).)

The Pinguino.

The Pinguino Sailplane which was designed, built and flown by Dr. Garbell in 1936 and 1937, is asserted by the Appellants to be an anticipation of the patent in suit. This is obviously not true. The Pinguino does not have the greatest camber at the tip but has it at some interjacent sections. It does not have the greatest thickness ratio at the root but at some interjacent sections [R. 285-286, 479-480]. The Pinguino does not in any way meet the claims of the patent in suit as the tip camber is not the greatest. None of the published descriptions of the Pinguino describe the Garbell Stall.

The Appellees do not and never have contended that the Pinguino is a reduction to practice of the Garbell patent in suit. In fact, the geometric configuration of the Pinguino is entirely different from that of the patent in suit and is not usable in a high speed aircraft [R. 241, 283-284].

There is no published description of the Garbell Stall in the literature prior to the Garbell patent. No person from a mere examination of the configuration of the Pinguino could understand and develop the geometric wing configuration required to build a wing for a high speed aircraft that would accomplish the Garbell Stall as he would not know from seeing and using the Pinguino the theory in the mind of the Pinguino's designer [R. 242]. The change from the wing geometry of the Pinguino to that of a high speed aircraft would and did require a high degree of inventive thought and effort [R. 242]. It is significant that although the Pinguino was built in 1936 and 1937 and its wing geometry described in the literature, no one other than Dr. Garbell was able to design the Garbell Stall or geometric configuration.

The Claims in Suit "Particularly Point Out and Distinctly Claim the Part, Improvement or Combination."

Claims 1, 2, 3, 5, 6 and 12 of the Garbell patent "point out and distinctly claim" the invention (R. S. U. S. 4888, 35 U. S. C. A. 33) which the District Court held to be new and patentable [Find. of Fact, XVI, XVII, R. 48-49]. The invention comprises a novel *combination* of three or more fluid foil sections having a definite camber relationship. It is this novel *combination* of fluid foil sections which comprises the invention. Claim 1 points out this novel *combination* of three particular fluid foil sections and gives their locations. These fluid foil sections are described as positioned (1) at the root, (2) at the tip, (3) at an interjacent position between the root and tip. The fluid foil sections in this novel combination are then described as to camber. The section at the root has "*smallest* mean-line camber," the section at the tip has "the *greatest* mean-line camber," the interjacent section has camber which is "greater than the values of mean-line camber obtainable . . . by means of straight-line fairing."

Appellants assert that the failure to "point out and distinctly claim" the invention is because the only novel element of this claim is "greater than the values of mean-line camber obtainable . . . by means of straight-line fairing." This is not true. The invention comprises the entire new combination of three fluid foil sections constructed as set forth in Claim 1, not any one element

of that combination. The prior art, as before pointed out, does not show such a new combination. Appellees admit that the individual elements of this combination are old. There is, however, no prior art describing this *particular combination* of three particular fluid foil sections and their particular relationship to one another.

There is no denying that the patent in suit describes a new function; namely, the Garbell Stall, which has not been described or used by any one prior to Dr. Garbell. The combination of the patent in suit is a new combination of elements which produces a new result, even though all the individual elements thereof are old.

> "It must be conceded that a new combination, if it produces new and useful results, is patentable, though all the constituents of the combination were well known and in common use before the combination was made. * * *" *Hailes v. Van Wormer,* 20 Wall. (87 U. S.) 353, 368, 22 L. Ed. 241, 248.

See also:

Leeds & C. Co. v. Victor Talking Machine Co., 213 U. S. 302, 318, 53 L. Ed. 805, 813;

Rees v. Gould, 15 Wall. (82 U. S.) 187, 21 L. Ed. 39, 40-41;

Grinnell Washing Mach. Co. v. Johnson Co., 247 U. S. 426, 432, 62 L. Ed. 1196, 1199;

National Hollow Brake Beam Co. v. Interchangeable B. B. Co., 106 Fed. 693, 706-707.

Infringment of Patent in Suit.

Infringement of the patent in suit was proven by the testimony of Dr. Garbell at the trial. Testifying from Exhibit 20 he disclosed the camber relationship and the thickness ratios of the Convair 240 wing, showing that the root section had the smallest camber, the tip section the greatest camber, and the interjacent section had smaller camber than at the tip and more camber than at the root, and that the interjacent section had a greater camber than would be derived by straight-line fairing. The thickness ratio was such that the root had the greatest thickness ratio and the tip the smallest thickness ratio, and the interjacent section smaller thickness ratio than the root and greater than the tip, and the interjacent section had smaller thickness ratio than would be derived by straight-line fairing. The wing of the Convair 240 is a highly tapered wing [R. 220-227, Exhibit 21, R. 653, 1005].

These facts are substantially admitted as correct in the Opening Brief of Appellants [R. 54]. There was no cross-examination of Dr. Garbell or evidence to the contrary. It is clearly seen by a comparison of the camber and thickness ratio in the three control sections of the Convair 240 Model and those of the patent in suit that they are exactly those described and set forth as the invention of the patent in suit.

There is no challenging evidence in the record contrary to Dr. Garbell's testimony that the stall of the Convair 240 was the same as the Garbell Stall [R. 442].

Dr. Garbell arrived at his conclusions from the flight test reports and C. A. A. Comments contained in Exhibit 35. No cross-examination was made of Dr. Garbell

as to the conclusions reached by him or as to his qualifications as an expert. There is no denial in the record that Dr. Garbell is an expert aerodynamicist and stall specialist, and that he knows how to and has flown aircraft [R. 157-159]. In the face of the unchallenged testimony of Dr. Garbell concerning the actual construction of the wing and the stalling characteristics of the Convair 240 wing, defendants at the trial abandoned that defense. No evidence in any way rebutting any of Dr. Garbell's statements was offered and the only evidence offered was in corroboration.

A predecessor to the Convair 240 was the Convair 110, and it is admitted that the wing of the 110 was used on the 240 [R. 418]. Therefore the stall characteristics would not change substantially from one aircraft to the other. One of defendants' experts, K. Ward, admitted the infringement of the patent in suit. . . .

> "As I recall, there was some question about using the three control sections on that airplane, because of the fact that it was necessary to put the interjacent control section inner to the root, when it would have been more desirable to put it at approximately 60 per cent semi-span. The benefits to be gained by using the three control sections are there, but they are small." [R. 417.]

Appellants' employee, K. Ward, testified that he witnessed some initial root stall troubles during "the flight tests of which I (Ward) witnessed the tufts of the wings that were installed" [R. 419]. Ward did not testify on the extent of the tuft coverage on the wing that he observed; he confined his testimony to the very first Model 240 aircraft and emphasized that the root stall disturb-

ance was eliminated by necessary corrections of faults in the nacelles and control systems *only,* that is, not on the wing itself [R. 421], thereby fully corroborating Dr. Garbell's testimony [R. 272, 287-289, 442].

A further proof of the infringement of the patent in suit by the Convair 240 is the admission against interest made by defendant, Consolidated Vultee Aircraft Corporation [Exhibit 21], that "Claims 1, 2, 3, 5, 6 and 12 appear to be utilized by the Model 240 wing" [R. 653]. This was a statement given by counsel for the defendants to counsel for the plaintiffs [R. 227-228], and explains why no defense of noninfringement was offered by the defendants at the trial of the cause.

Appellants now state that there are no benefits in the Garbell invention. They admit they wished to use the benefits and did secure the benefits by their use of the Garbell invention [R. 417, 418] even though they admit that a three-section wing is more expensive and costly than the older, conventional two-section wing utilizing straight-line fairing [see Op. Br. of App. p. 31; R. 304]. Appellants pay tribute to the invention in their advertisements for the Convair 240 where they say "New high-efficiency wing" [Exhibit 23, R. 234, 238].

Even though the Convair 240 has a highly tapered wing [R. 225], the stalling characteristics of this aircraft were so satisfactory that C. A. A. approval was given for the commercial use of this aircraft in the United States without the use of any stall warning devices [R. 231-232, 444-445].

The District Court found as a matter of fact that the Convair 240 infringed the patent in suit [Find. of Fact XXV, XXVI, R. 51]. These Findings are based on the evidence of Dr. Garbell. There was no contrary evidence offered and they must be accepted as ruling in this case.

Appellants now assert noninfringement because the interjacent section of the Convair 240 is at the 30.7% point on the wing while they assert that the patent states that the interjacent section should be at the 55% to 60% point. Appellants ignore the teaching of the patent that because "practical design considerations" and "power plant nacelles" modify the lift in sections of the wing, the optimum position of the interjacent section (55% to 60% point) cannot be used and the interjacent section may be moved inwardly even inside the power nacelles [Garbell patent, p. 4, colm. 7, lines 29-38; p. 5, colm. 10, lines 26-37]. Appellants have used the invention in one of its less efficient forms but they obtain the mode of operation, benefits and results of the patent in suit [R. 417-418].

In *Stearns-Roger Mfg. Co. v. Ruth* (10 Cir.), 62 F. 2d 442, the Court said at 449:

> "One may not avoid infringement by making a device which differs in form or is more or less efficient than the patented device, when he appropriates the principle and mode of operation of the patented device and obtains its results by the same or equivalent means."

In *Williams Iron Works Co. v. Hughes Tool Co.* (10 Cir.), 109 F. 2d 501, 502, the Court said:

> "Impairment of function and lessening of result, in degree only, does not avoid infringement."

Appellants Have No License, Either Express or Implied.

The Invention of Dr. Garbell Was Made Prior to Dr. Garbell's Employment by Defendant, Consolidated Vultee Aircraft Corporation.

That the invention of Dr. Garbell was made prior to any employment by defendant, Consolidated Vultee Aircraft Corporation, was found to be a matter of fact by the District Court [Find. of Fact XXXV, XXXVI, XLV, R. 53, 55].

The evidence fully supports these findings and is not in dispute. Dr. Garbell's testimony of how and when he made the invention was not refuted in any way and was corroborated in many details. Dr. Garbell conceived the idea of the Garbell Stall while working on gliders in Italy in 1936-37 and developed a wing which was incorporated in a sailplane known as the Pinguino, which accomplished this stall. However, the wing of the Pinguino was not usable in a high powered aircraft. By a "high powered" aircraft we mean a plane that would be usable for commercial purposes, such as the Convair 240 in distinction from what might be called a powered glider [R. 239-242, 284].

It was the undisputed testimony of Dr. Garbell that it did require invention over and beyond what was done in the Pinguino to produce a wing for high powered aircraft that would produce the Garbell Stall [R. 242]. During Dr. Garbell's trip to the United States in 1939 he had several days at sea and during that time he worked out and invented the particular combination described as the invention of the patent in suit, and at that time he made full drawings and sketches of the device [R. 165,

172-190, 199]. This completed the invention of the patent in suit. His facts and figures never had to be altered to manufacture an aircraft incorporating his invention [R. 280-281, 461-462]. The whole inventive concept was complete at that time.

Appellants assert that an invention cannot be complete until it has been reduced to practice. This is not the law except in one particular field and that field is where there is a dispute between parties as to who first made the invention. In such a case a special rule of law has been developed by the Patent Office and the Federal Courts that to prove invention *where there is a dispute as to who was the first inventor* the one who made the first reduction to practice would be deemed the inventor in law. In this case there is no dispute as to who the inventor is. Appellants have not denied that Dr. Garbell was the inventor and the only question before this Court is the date of that invention. It would be a strange rule of law that would say that a man had not made the invention prior to his disclosing it to another party merely because he had not made a working machine or a patent application.

It cannot be disputed and is not disputed that almost immediately upon his employment by the Appellant, Consolidated Vultee Aircraft Corporation, Dr. Garbell offered Consolidated Vultee Aircraft Corporation all facts and figures necessary to practice the invention [R. 311-312, 446]. Appellants now say that his invention was not made until the first aircraft was built. That is their meaning when they assert that no invention is complete until there is a reduction to practice.

Such a rule of law would completely deprive most inventors of their inventions because very few have the means or facilities to carry out an actual reduction to

practice. No single inventor has finances for constructing a high powered aircraft. Appellees agree with the law set forth by Appellants that where the dispute is between two or more people, each claiming to have made the invention, that the only fair way to determine the facts is by who first made a reduction to practice. But such is not the case here; admittedly one party made the invention and disclosed the invention to the other, and now the party to whom the invention was disclosed claims that the invention could not have been made until the manufacturer (himself) produced an actual finished machine. If the Court could make such a rule of law, all inventors would be subject to the claim of license as soon as the inventor approached a manufacturer and disclosed the invention.

A further proof that Dr. Garbell had made the invention prior to his employment by Appellant, Consolidated Vultee Aircraft Corporation, is the fact that in 1939 he completely disclosed his invention and made it known to Dr. Platt and to Harry Bradford Chin; that he made sketches and drawings on paper and on a blackboard and that both of these parties at that time fully understood his invention [R. 199-207]. The testimony of Dr. Garbell as to the disclosures to Dr. Platt and Harry Bradford Chin is not contested in the record. Of course Dr. Platt had died and was not available. Harry Bradford Chin not only was available but Appellants had sufficient time to interview and call Harry Bradford Chin as a witness or most certainly could have asked leave of Court to take his deposition. His address and telephone number, both at his home and at his place of business in San Francisco, were intentionally given in the direct testimony of Dr. Garbell [R. 231]. A recess of two and one-

half days was taken by the Court after the whereabouts of Mr. Chin were given. Five days elapsed after the testimony concerning the disclosure to Chin before the end of the trial, yet Appellants made no effort to ask leave of the Court to take the deposition of Mr. Chin or to have him called as a witness [R. 231].

It is very evident from the record that the District Court gave complete credence to the testimony of Dr. Garbell as to when he made the invention and the fact that he had disclosed it to Dr. Platt and Harry Bradford Chin, and the evidence is conclusive to support the Court's Findings of Fact to that effect [Find. of Fact XXXVI, R. 53].

The rule of law by which this Court is bound is that if a witness is believed and uncontradicted, his testimony is sufficient to prove that fact, Code of Civil Procedure, Section 1844.

> "It is a general rule that 'the uncontradicted testimony of a witness to a particular fact may not be disregarded, but should be accepted as proof of that fact.'" (*Joseph v. Drew,* 36 Cal. 2d 575, 579.)

> "The direct, uncontradicted and unimpeached testimony of a witness is sufficient to support a finding." (*Giese v. Los Angeles, 77* Cal. App. 2d 431.)

The District Court is bound by the rules of evidence of the State of California, 28 U. S. C. A., Sections 1652, 43(a).

Appellants have cited the case of *Conway v. White,* 9 F. 2d 863, in support of their proposition that the invention was not made until it was reduced to practice during Dr. Garbell's employment by Consolidated Vultee Aircraft Corporation. They have set forth that in the

facts of the *Conway* case the defendant claimed to have made the invention *before* his employment and that the Court held his invention was made during the employment. Appellants have merely read the pleadings in this case and not the facts. In *Conway v. White (supra)* the defendant therein made a machine during his employment which he alleged did not contain the full embodiment of his invention and that he completed the invention *after* he left the employment of the company. The Court held that although the machine constructed *during* his employment did not embody the best example of his invention, that it did embody the invention and therefore fell under the License Agreement and became the property of the company even though the more successful embodiment had been made *after* he left the employment of the company. There were no facts set forth in the *Conway* case showing that the defendant had made the invention *prior* to his employment. The *Conway* case is not authority in this present action as the facts are that Dr. Garbell made his invention before his employment by the Appellant, *i. e.,* directly the opposite set of facts to those developed in *Conway v. White.*

The Court found, as a matter of fact, and properly so, that Dr. Garbell made his invention prior to his employment by Consolidated, and therefore, Appellants had no license, either express or implied [Find. of Fact XXXIV, R. 53]. The Court held as a Conclusion of Law that the plaintiffs herein are the owners of all right, title and interest in and to the Letters Patent in suit and that plaintiffs are entitled to a judgment for infringement as heretofore set forth [Concl. of Law, I, IV, V, VI, R. 56-57].

No License to the Patent in Suit Was Granted by Exhibit 16.

Appellants contend that the Invention Agreement [Ex. 16, R. 633], gave the Appellants a license under the patent in suit on the grounds that the invention was made during the employment of Dr. Garbell by Appellant.

The District Court found that there were no facts upon which to base such a license [Find. of Fact XXXIV, R. 53].

Exhibit 16 calls for certain payments to be made to Dr. Garbell for inventions coming within the metes and bounds of the Invention Agreement [Exhibit 16]. It is undisputed that no sums were ever paid Dr. Garbell for the patent in suit in accordance with such an agreement [Find. of Fact XLI, R. 54, 281-282]. It is very clear that the Appellant, Consolidated Vultee Aircraft Corporation, never considered the invention of the patent in suit as falling within Exhibit 16 as they never laid any claim to the invention [R. 461], never asked for and never secured an assignment of the invention, never asked Dr. Garbell to execute any papers in regard to this invention. They never offered, tendered or paid him any of the sums due under the Invention Agreement for the invention of the patent in suit and at all times they discouraged the use of the invention [R. 234-237, 261, 278-279, 313, 314, 360-362, 461]; in fact, it was customary to speak of the invention as the Garbell "cock-eyed" idea [R. 236, 301-302]. Consolidated Vultee Aircraft Corporation had a policy of calling inventions not falling under similar Invention Agreements by their inventor's names and they referred to the invention in suit as the "Garbell Wing" [R. 460]. At all times they rejected the invention unconditionally and unequivocally; they

would have nothing to do with it. We have a clear case here of a rejection of the invention as was had in *Pointer v. Six Wheel Corporation,* 177 F. 2d 153.

The pattern of the relationship between Dr. Garbell and Consolidated Vultee Aircraft Corporation is shown by the entire testimony of Dr. Garbell and the witnesses called by Appellants. Dr. Garbell was rebuffed at all times in his attempt to interest Consolidated in his invention which he had conceived and perfected before his employment. Consolidated never asserted any rights to the invention either under the Invention Agreement [Ex. 16] or upon any other theory and never took any steps to acquire any rights under a separate contractual arrangement; in fact, they rejected the offers of Dr. Garbell at all times and cast aspersions upon his invention and then, after their judgment had been proved faulty (the invention had merit), they endeavored to assert rights thereto. Any ethical norm which should dominate in the relationship of employer and employee should command a rejection of this belated claim by the employer [R. 43].

The facts are that Dr. Garbell almost immediately upon becoming an employee of Consolidated Vultee Aircraft Corporation attempted to interest Consolidated Vultee Aircraft Corporation in his invention and it was completely rejected. It is amazing to see a company claim that the invention was made during his employment and therefore falls under the Invention Agreement [Ex. 16] when Dr. Garbell had been working on this problem for years and was able to submit the full invention to his employer at the very outset of his employment [R. 311-312, 446-447]. No request for a disclosure of prior inventions was ever made by Consolidated [R. 213-214].

Dr. Garbell did not wait until a long period of his employment had passed before he first sought to interest Consolidated Vultee Aircraft Corporation, but did so at the outset. How could he make the involved invention of the patent in suit *simultaneously* with his employment? There is no proof in the record that Dr. Garbell was working on stall problems for Consolidated Vultee Aircraft Corporation; in fact, the actual problems and engineering work done by Dr. Garbell during his employment by Consolidated Vultee Aircraft Corporation was work on entirely disassociated subjects, namely, gun firing control, mechanical design of tail surface controls, and nacelle designs. None of this work in any way related to stall problems [R. 216, 294, 445-446].

Appellants contend that Exhibit D [R. 775] was a disclosure of the Garbell invention to the company in line with and under the terms of the Invention Agreement [Exhibit 16]. This argument of Appellants is completely refuted by the testimony of their witness, Mr. Bayless, who stated that this paper was prepared at his request for publication in the Institute of Aeronautical Science technical papers and was not written and submitted to the company for the purposes of being a disclosure under the terms of the Invention Agreement [R. 301]. After receiving Exhibit D, Consolidated's Patent Department asked for additional information [Exhibit F, R. 790], but when it was not sent [R. 368], dropped the subject matter.

When Dr. Garbell was asked to prepare for publication a paper on the Garbell invention, he obviously realized that such a publication, in all probability, could be considered a publication within the meaning of the Patent

Laws. With the sole purpose in mind of protecting his patent rights, he transmitted a copy of the paper as prepared to the company with language which, to his mind, would act as a red flag to Consolidated and direct their attention to the fact that he had exclusive property rights in the invention described in the paper.

That Consolidated considered this letter of transmittal in the light in which it was sent, to our mind, is amply demonstrated by the fact that on August 9, 1946, Consolidated wrote a letter to Dr. Garbell, which states in part: "We will accept a copy of the patent application to which you refer for the purpose of a disclosure, on the basis that in so doing, the disclosure is made to us without obligation * * *." [R. 641.] If the patent had been disclosed under the Invention Agreement theory in 1944, why the request for a disclosure in 1946, which request is obviously framed with the Patent Laws in mind?

The Court will bear in mind that at no time did Consolidated do anything or take any steps, or make any claim of title or license in connection with the Garbell invention following the receipt by it of the letter [Exhibit E, R. 789].

The complete disinterest of Consolidated in the Garbell invention is disclosed by Exhibit F in which they ask for more information concerning Exhibit D, but when no further information was given them by Dr. Garbell, there was no follow-up and nothing further was done, even though Dr. Garbell still remained in the employ of the company until October, 1945.

All of this evidence, the continued rejection, the scoffing at the idea, the failure to take any positive action to

secure title or a license, or an interest, the failure to pay under the Agreement [Exhibit 16], along with the acknowledged use of the term "Garbell Wing," all spell out a pattern showing that the officers and employees of Consolidated Vultee Aircraft Corporation never considered that the Garbell invention was included under the terms of the Invention Agreement [Exhibit 16], and that there was a separate invention made by Dr. Garbell prior to his employment. These facts conclusively support the Findings of Fact of the District Court that Appellants had no express license under Exhibit 16.

Appellants Have No Implied License.

Appellants allege an implied license under the patent in suit on the alleged basis that during Dr. Garbell's employment by Consolidated Vultee Aircraft Corporation the corporation expended time, effort and money in developing and proving the invention of Dr. Garbell. The District Court held as a matter of fact that there was no basis for such a claim and that no monies, time or effort of the corporation had been expended in perfecting, testing, developing, adapting or modifying the invention of the patent in suit [Find. of Fact XXXVIII, XXXIX, XLV, R. 53-55].

The facts relating to this issue are that Dr. Garbell included his invention in several suggestions [Exhibit B]. These included a prospective report for a 2-engine tailless model, suggestions for the XB 46 and for the Convair 110 along with several other aircraft. None of these aircraft were designed or built during Dr. Garbell's employment and his suggestions were all rejected. In each of these suggestions there was described at least another

wing of conventional 2-sectional design and Dr. Garbell was told Consolidated preferred to use such 2-sectional wing [R. 249, 255-257, 279, 322, 455, 326, 418, 457-459, Exhibit 25].

It should be pointed out that these suggestions were merely offers or proposals to try to design and to build an aircraft in accordance with the structures described therein and that during his employment and until long after, none of these planes were *built* using any of the suggestions, and at all times up to the end of the employment of Dr. Garbell he was informed that they would not be used. There was a complete rejection of these suggestions. Certainly the mere proposal of the use of an invention to an employer followed by the rejection of the use of the invention is not such an expense of time and money as to justify an employer claiming an implied license or shopright. It is evident from the testimony of Dr. Garbell, Messrs. Bayless, Ward and Jason taken as a whole that, if the company had at any time expressed a desire to use the invention of Dr. Garbell, or even a desire to test or try out the invention, or to make a working model thereof, both the Appellant, Consolidated Vultee Aircraft Corporation, and Dr. Garbell would have realized that there would have to be an agreement as to the terms and considerations under which Consolidated could acquire rights in the invention [R. 447-451].

In connection with the claim of Appellants that monies were expended on the Garbell invention, it was testified that small scale models were made for testing in wind

tunnels. Right at the outset let us state that the invention was complete in and of itself. The few instances where a model using the Garbell invention was so tested merely proved the contentions of the inventor that certain definite stall characteristics would and did result. There was no experimentation [R. 461-462].

This practice of testing an invention was not unusual for it was one that was followed by Consolidated in all so-called outside inventions [R. 460-461]. The assertion that tests were made to determine whether wings embodying the invention in suit were practical in no way affects the Findings of Fact [Find. XXXVIII, XXXIX, [R. 53-54] that nothing was done to develop or adapt or modify the invention. No wind tunnel tests or any other tests made of the Garbell invention at or by Consolidated added anything to the conception of the practical carrying out of the invention. Stated another way, there was no change in the invention from before the tests to after the tests. The very first suggestion which was made for the use of the invention was complete and contained all of the elements; nothing was modified by any test [R. 461-462].

The only so-called models that were made embodying the Garbell invention were these: a small scale static (nonoperating) model of the tailless aircraft, which model was made and used primarily for the testing of the Sutton control surfaces [R. 323-324, 454-458, 685]; a static (nonoperating) model for the XB-46 which principally served as a platform for testing of the engine nacelles, flaps, controls, etc. [R. 458].

We would like to point out to the Court that the only operating model of the tailless aircraft ever constructed had a two-section wing thereon [R. 257, 322-323, 455]. Just before Dr. Garbell severed his employment with Consolidated a mock-up (full scale nonoperating model) was made of the XB-46 and this mock-up did not contain the three-section Garbell wing but the conventional two-section wing and Dr. Garbell never knew and was never informed that the XB-46 was to include his invention [R. 459].

At the time Dr. Garbell left the employment of Consolidated the design of the Convair 110 had been abandoned and to the best knowledge of Dr. Garbell at the time he left the employment of the company, the company had no intention of using his invention and had not used it in any way whatsoever theretofore [R. 458-459, 418].

To secure an implied license, the alleged licensee must have used the invention with the express permission and knowledge of the alleged licensor. In the case at bar there is unauthorized use of the patent in suit after Dr. Garbell left the employment of Consolidated. This use was unknown to Dr. Garbell.

The facts are that Dr. Garbell had been continuously informed that the company would not use his invention and had not used his invention prior to his leaving the company. Certainly no right to use the patented invention can be implied from these facts.

The Court Properly Denied Defendants' Motion for a New Trial.

Defendants are not entitled to a new trial on the grounds of surprise at the trial which ordinary prudence could not have guarded against.

The alleged surprises at the trial were:

1. The testimony of Dr. Garbell as to conversations with Harry Bradford Chin;
2. The introduction in evidence of Exhibit 25.

All of these alleged surprises took place on the first two days of the trial, November 21 and November 22, 1950. There was no request at the time for a continuance to take the testimony of Harry Bradford Chin or the testimony of two former employees whom defendant now wishes to call, namely, Theodore P. Hall and Donald A. Hall. In fact, a recess was taken of one day after the first two days of trial and a two and one-half days' recess after the third day of trial so that the final argument of this case was made on November 27, 1950, six days after commencement of the trial and at least five days after the alleged surprises. At no time during the trial was there any suggestion or allegation of surprise by counsel of defendants. At no time was a continuance requested. There was no cross-examination of Dr. Garbell as to his conversation with Harry Bradford Chin, Theodore P. Hall or Donald A. Hall. There was no request made to the District Court to reopen the litigation for the taking of testimony of Harry Bradford Chin, Theodore P. Hall or Donald A. Hall between the time of the commencement of the trial and the time of the Memorandum Decision on December 7, 1950. No at-

tempt was made to reopen the testimony until ten days after entry of Judgment on January 15, 1951. Defendants showed no diligence in moving the District Court to permit the enlargement of the record by taking the testimony of these three witnesses.

To be grounds for a new trial a surprise occurring during trial must be one which ordinary prudence does not guard against. Certainly ordinary prudence would have required the defendants to have called Theodore P. Hall, Donald A. Hall and Harry B. Chin, rather than to allow the Court to spend over a month preparing a decision and then to wait a second month during which the Court and Plaintiffs prepared Findings of Fact, Conclusions of Law and a Judgment before attempting to reopen the case.

> *Ruedy v. Town of White Salmon*, 35 Fed. Supp. 130;
>
> *Dow v. Carnegie-Illinois Steel Corp.*, 70 Fed. Supp. 1016 at 1019.

Passing to the merits of the question of new testimony, and especially the affidavit of Harry Bradford Chin [R. 66], the Court should note the affidavit of Theodore Roche, Jr. [R. 1111].

A comparison of the affidavits of Harry Bradford Chin, Theodore Roche, Jr., and the testimony of Dr. Garbell shows that not only Chin does not deny the testimony of Dr. Garbell, but that he had made previous statements confirming the same [Affidavit of Theodore Roche, Jr., R. 1111].

The affidavits of Theodore P. Hall, Donald A. Hall, Harry C. Matteson and William W. Fox disclose that they are all employees or former employees who could have been called at the trial, their existence and whereabouts being known to Appellants, and certainly they could have been questioned at any time, but were not.

The grounds for a new trial on the assertion of newly discovered evidence is completely fallacious. As has been shown, there was no newly discovered evidence in the case of Harry Bradford Chin.

To be newly discovered evidence it must be evidence which, through ordinary diligence, the Appellants could not have found prior to the trial. Certainly the head of their Patent Department and the direct superior of Dr. Garbell, namely, Donald A. Hall and Theodore P. Hall, respectively, should have been expected to know facts that might have importance at the trial of this action, and Appellants' counsel are chargeable with negligence, to say the least, if they did not interview these parties prior to the trial. They now say they have just discovered the alleged evidence. In fact the affidavit of Theodore Roche, Jr., shows that Defendants actually had interviewed these men two years before the trial [R. 1113, 1114].

The alleged testimony of Harry C. Matteson and William W. Fox is that of persons who alleged that they flight tested the Convair 240. Certainly Appellants' counsel are chargeable with knowledge of what these wit-

nesses would say concerning the operation and characteristics of the accused 240 aircraft. Any testimony they had to give as to the performance or operation of this aircraft should have been fully known to counsel and certainly was known by Consolidated long prior to the trial. None of the evidence set forth in any of the affidavits of these employees, past and present, is newly discovered. The real facts of this case are that Appellants have new counsel who do not agree with the theory and practices of their predecessors at the trial of this case and now want to go back and try the case in their own manner. If such a practice were allowed, it would mean that a defeated party could always obtain a new trial by hiring new counsel and there would be no end to litigation.

The claim that the evidence was insufficient to justify the decision as to the infringement of the patent in suit has been fully covered heretofore in this Brief (p. 34), and all that remains is to state that there was no error of law in the District Court's holding that the burden of proof had shifted to defendants to negate the *prima facie* showing made by Dr. Garbell that the patent in suit was infringed. Especially is this true when the admissions against interest heretofore referred to are added to the testimony of Dr. Garbell. Of course the affidavits of Matteson and Fox do not go unchallenged, but are completely refuted by the affidavit of Dr. Garbell [R. 1131].

It should be noted by this Court in passing that Fox, who now wishes to testify in this case, actually filed af-

fidavits in the case months before the trial, so he certainly cannot be called a newly discovered witness [R. 493].

The Trial Court properly held that there was no surprise, no newly discovered evidence, and that the evidence as to infringement was completely sufficient, and therefore correctly denied the motion.

New Evidence Not Before the Trial Court Was Inserted in Opening Brief of Appellants.

In the Opening Brief of Appellants they have introduced considerable evidence which is not in the record. This includes, first, the entire Appendix C, which was never introduced in evidence during this case; also, they included in their Brief eleven plates, none of which was introduced in evidence. None of this evidence was before the Trial Court or formed any part of the basis upon which the Trial Court rendered its decision.

It is believed that this Court should disregard this new evidence as there is no proof as to its correctness. Furthermore, it should be noted that in the Opening Brief the Appellants have used the affidavits accompanying their Motion for a New Trial as if they were evidence. Especially is this true on pages 19 and 29.

All this evidence which Appellants now attempt to insert into the suit was available to them many months before the trial of this action and it was not offered at the trial [R. 1111, 1131].

Conclusion.

It is respectfully submitted that the Judgment of the District Court in finding the Garbell patent to be valid and infringed was in accord with the overwhelming evidence before that Court. In fact, there is no evidence to the contrary.

It is further submitted that the Appellants' claim of a license has no basis in fact or law and the District Court's Findings of Fact that there was no license of any type is supported by uncontroverted evidence.

It is further submitted that the motion for a new trial had no basis in law or fact and was properly denied.

Appellees therefore respectfully submit that the Judgment of the District Court should be affirmed.

Respectfully submitted,

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By Theodore Roche, Jr.,

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No. 12885

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Consolidated Vultee Aircraft Corporation, a Delaware corporation, and American Airlines, Inc., a Delaware corporation,

Appellants,

vs.

Maurice A. Garbell, Inc., a California corporation, and Garbell Research Foundation, a California corporation,

Appellees.

REPLY BRIEF OF APPELLANTS.

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REPLY BRIEF OF APPELLANTS.

Introduction.

This is in reply to the Brief of Maurice A. Garbell, Inc., *et al.*, filed in this action. Most of appellees' principal contentions are answered by our Opening Brief. However, Appellees' Brief raises several points that appear to merit a reply or comment. While many of the factual statements made in Appellees' Brief are unsupported in the evidence, or misleading, such errors are largely self-revealing, and we are content with the following reply.*

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*Unless otherwise noted, all emphasis in this brief is ours.

The Claims Do Not Cover the Alleged Invention.

In an obvious attempt to avoid the prior art, Appellees' Brief (pp. 7-8) defines the alleged invention of the patent in suit, without regard to the claims in suit, as follows:

> "The patent in suit specifically describes that in order to achieve the Garbell Stall the semispan of a wing should have three or more control sections and these three control sections *must have* a definite relationship to one another. This relationship is:
>
> 1. The root control section *must have* the least mean-line camber and the greatest thickness ratio of the entire wing;
>
> 2. The tip control section *must have* the greatest mean-line camber and the smallest thickness ratio of the entire wing; and
>
> 3. There *must be* at least one interjacent control section between the root and the tip and this section *must have* a greater mean-line camber than the root section and a smaller mean-line camber than the tip section, and the mean-line camber of the interjacent control section *should be* greater than that which would be derived from straight-line fairing from the root section to the tip section, and the thickness ratio of the interjacent control section *should be* smaller than that of the root section and greater than that of the tip section, but smaller than would be derived from straight-line fairing from root section to tip section."

Much the same definition is given elsewhere in Appellees' Brief (*see:* pp. 9 and 20).

If we assume that appellees' definition of the alleged invention of the patent in suit is correct, all of the claims in suit are plainly fatally incomplete and invalid, as they

fail to "distinctly claim the part, improvement, or combination which he claims as his invention or discovery," as required by Section 33 of Title 35, United States Code. None of the claims in suit, obviously, covers the alleged invention so defined by appellees. Claims 1, 2 and 3 of the patent in suit say *nothing whatever* about "thickness ratio" of *any* of the airfoil sections; and claims 5, 6 and 12 say *nothing whatever* as to the "mean-line camber" of the *"interjacent" sections.* If the designated relationships of *both* camber and thickness ratios are *essential* to the invention of the patent in suit, as stated in Appellees' Brief, *supra,* plainly the claims in suit are fatally deficient for failing to define both relationships. Obviously, the wing defined by claims 1, 2 and 3 in suit can have *straight-line fairing* from root to tip so far as "thickness ratio" is concerned, and the wing defined by claims 5, 6, and 12 in suit can have *straight-line fairing* from root to tip so far as "mean-line camber" is concerned. All of the claims clearly cover far more than the alleged invention, and are all wholly indefinite in each case to at least one of the relationships (either camber or thickness ratio) which appellees say are all *essential* to the alleged invention. All of the claims are therefore clearly invalid. (*See: Goodman v. Super Mold Corp. of Calif.*, 103 F. 2d 474, 480 (C. C. A. 9th, 1939): *Crampton Mfg. Co. v. Crampton,* 153 F. 2d 543, 544 (C. C. A. 6th, 1946): *Altoona Publix Theatres, Inc. v. American Tri-Ergon Corp.,* 294 U. S. 477, 55 S. Ct. 455, 79 L. Ed. 1005 at 1012; *Great A. & P. Tea Co. v. Supermarket Equipment Corp.,* 340 U. S. 147, 71 S. Ct. 127, 95 L. Ed. 162 at 165.)

Furthermore, this self-serving definition, obviously for escaping from some of the prior art, imports the stated relationship as a necessity for stall achievement in direct *contradiction* of the specification which states (Col. 4, lines

51-59) that the interjacent station may have any camber *not exceeding* the tip section or *below* the *camber* of the root. These equal cambers are not the least or greatest of the entire wing within the definition, but are asserted to achieve the same result. That contradiction imparts to the patent the vice of misrepresentation as to what is essential. The patentee is bound by the representations in the patent. If too broad the patentee's remedy is by filing a disclaimer.

This self-serving definition into the claims imports another fatal inadequacy or insufficiency as defining the essential for producing the so-called Garbell stall or *any* specific stall. There is not the slightest clue: In the greater camber specified in claim 1; the "at variance" camber specified in claims 2 and 3; in the thickness variations specified in claims 5, 6 and 12; which are the *sole* purported changes asserted for novelty in the claims individually, which point to the production of any *specific* character of stall. *In*crease camber cannot produce the same result as *de*crease. *In*crease in thickness can*not* produce the same result as *de*crease. Each of the individual changes is reflected in a difference in result. There is not the slightest clue in the claims to the spanwise locations of the changes, or of the extent of the changes, all of which are factors in the production of stall characteristics. There must be camber and thickness changes of a definite kind in degree and in a specific spanwise location to produce any specific stall, such the so-called Garbell stall or others, and the obvious insufficiency, indefiniteness and vagueness of the claims, make it impossible to find in them a definition of a construction for producing *any specific,* or the alleged "Garbell," stall. The conclusion is inescapable that the claims do not and were not intended to define a construction which produces any *particular* stall.

The Patent in Suit Does Not Fulfill Any Long-Felt Want.

Appellees' Brief (pp. 3-6) asks this Court to believe that, prior to the alleged invention of the patent in suit, there was no airplane having a tapered wing which had satisfactory stall characteristics. This, we suggest, is not supported by the evidence. This Court may take judicial notice of the fact that, for many years prior to the alleged invention here in suit, there were thousands upon thousands of aircraft flying in the United States by individuals, commercial airlines, and the military, all of which were satisfactory. This is confirmed in the evidence by the thousands of Vultee Vengeance, Glen L. Martin, and Vultee airplanes which were shown to have been generally satisfactory as to stall characteristics.

Appellees' Brief (pp. 5-6, 30) asserts that there was a long-felt need in the art for an aircraft wing design which would stall satisfactorily. Even if this were true (which we deny), there is no evidence that the alleged invention of the patent in suit provided the answer to the problem. It is not claimed by plaintiffs that anyone other than defendant Consolidated, has ever adopted Garbell's suggestion to use such a wing, although he asserts that he published a technical paper describing the invention in the year 1946 [R. 291]. Can this Court believe that all of the aircraft flying today, other than the defendants' Convair Model 240, are unsafe and have dangerous stall characteristics? We suggest that such a thesis is, on its face, untenable.

We therefore submit that there is no evidence that there was any long-felt need in the art for the alleged invention of the patent in suit.

The Alleged "Garbell Stall" Was Not Novel and Is Not Embodied in Defendants' Model 240.

Appellees' Brief (p. 6) baldly states that the patent in suit covers a wing which "has a totally new type of stall." Appellees' Brief (p. 38), however, admits that the 1937 "Pinguino" sailplane "accomplished this stall." Indeed, appellees could not well deny that the "Pinguino" accomplished such stall, as this is clearly established by the second Garbell patent which covers the "Pinguino" wing and which is printed as "Appendix C" to our Opening Brief (*see:* pp. 36-39 of our Op. Br.). It is therefore clear that the so-called "Garbell Stall" was *not* in fact novel with the patent in suit.

Appellees' Brief (p. 38) attempts to distinguish the patent in suit from the "Pinguino" wing by the allegation that "the wing of the Pinguino was not usable in a high-powered aircraft." This statement, we say, is belied by the second Garbell patent (App. C., Our Op. Br.), which covers the "Pinguino" wing and which states:

> "This invention accomplishes an important improvement in the art and the discoveries herein disclosed are of great value *to all types of aircraft* (as well as to craft operating in other fluids), *throughout their entire operating range . . .;* also in violent maneuvers *at high speeds. . . .*" (App. C, Col. 8, lines 58-68.)

We submit that the alleged "Garbell stall" was clearly old in the "Pinguino" which, of course, was fully described in printed publications long prior to the patent here in suit (see our Op. Br. p. 38), and that the "Pinguino"

wing structure, by Garbell's own admissions and representations in his second patent, was adapted for use in high-speed aircraft. There is therefore no novelty in the stall characteristics of the specific wing of the patent in suit.

Appellees' Brief (pp. 6-7) coins the term "Garbell Stall" to designate the type of stall alleged for the patent in suit, describing it as having the following special characteristics:

(a) In the Garbell stall, the flow of air over the upper surface of the wing first becomes turbulent over a large spanwise area of the lifting surface;

(b) Such initial turbulence is inboard of the lateral control devices;

(c) Such initial turbulence spreads inboardward therefrom;

(d) Such spread is characterized by a timely but not excessive stall warning through tail shake;

(e) Such tail shake occurs at a speed sufficiently but not excessively above the minimum level flying speed;

(f) Such spread is characterized by a substantial decrease in elevator control effectiveness as the aircraft approaches the stall;

(g) Such spread is characterized by a restoring pitching motion, nose down, with the absence of any excessive rolling motion prior to such restoring pitching motion;

(h) Such pitching motion being followed by the restoration of air speed necessary for sustained flight with only a small loss in altitude.

Appellees' Brief wholly fails to attempt to show where the evidence even tends to establish that defendants' Model 240 airplane operates to produce such a "Garbell Stall" as so defined by appellees. The reason for this failure in Appellees' Brief is obvious. There is no such evidence. Even Garbell failed to so testify.

Appellees' Dilemma as to Anticipation and Infringement.

Appellees' Brief (pp. 11-12, 34) in effect charges that because the defendants' Convair Model 240 airplane includes all of the asserted structural elements of the claims in suit it infringes, regardless of whether the proofs show that such airplane has the same mode of operation and result of the patent in suit. Yet, appellees in effect assert that certain of the prior art does not anticipate the patent in suit because there is no evidence that such prior art had the same mode of operation and result as that ascribed to the patent in suit.

We have shown in our Opening Brief (pp. 50-57) that there was a total failure of proof by the plaintiffs as to any similarity of mode of operation or result of defendants' Model 240 airplane to that ascribed by the District Court's findings to the alleged invention of the patent in suit, and that, in fact, the Model 240 wing has an entirely different mode of operation and result. Our detailed an-

alysis of this issue is not answered by Appellees' Brief. Although Appellees' Brief (p. 34) represents that Garbell testified "that the stall of the Convair 240 was the same as the Garbell Stall [R. 442]," an examination of the record reference plainly shows that Garbell never so testified, in substance or effect.

We suggest that appellees are in the following dilemma, either that: (a) if similarity of structure alone, between the patent in suit and defendants' Model 240 airplane, is sufficient to spell out infringement, then, similarity of structure between the prior art of record and the patent in suit is alone sufficient to spell out anticipation and invalidity; or (b) if the burden was on defendants to establish that the prior-art structures had the same method of operation and result as that of the patent in suit, then a similar burden was on plaintiffs to show by clear and convincing evidence that defendants' Model 240 airplane has the same method of operation and result as the patent in suit. Since the claims in suit read structurally upon the prior art, as fully pointed out in our Opening Brief, and since there was a complete failure of proofs by plaintiffs to establish that the Convair 240 has the same mode of operation and result as the patent in suit, we suggest that the judgment must be reversed on either alternative of such dilemma.

Appellees' Dilemma as to the Curtiss-Wright Airplanes.

Appellees do not seriously contend that the Curtiss-Wright airplanes, Models 19L, 23, and 21B, as shown by the evidence, did not include the identical wing geometry of the patent in suit. Indeed, there is no conflict of the evidence as to at least the Model 23 and 21B airplanes or their construction, as plaintiffs presented no evidence whatsoever with regard to them. Appellees' Brief (pp. 24-30), however, strenuously attacks the sufficiency of defendants' proofs on this subject, primarily attacking the oral testimony of the witness Oldendorph and its corroboration in the documentary exhibits.

It will be recalled that appellees rely solely upon the *wholly uncorroborated* oral testimony of Garbell in support of their contention that Garbell made the alleged invention of the patent in suit prior to his employ by defendant Consolidated.

Appellees, we suggest, are in the dilemma that either: (a) the oral testimony of Oldendorph, supported fully by the numerous exhibits in support thereof (see our Op. Br., pp. 39-42), is adequate to establish the fact of prior use of the Curtiss-Wright Airplanes and their wing construction; or (b) the oral and wholly uncorroborated testimony of Garbell is insufficient to establish conception of the invention by him prior to his employment by Consolidated. The standard as to the sufficiency of proof to carry back Garbell's alleged date of invention should be at least as high as the standard required for establishing a prior-art use of the invention. In fact, we suggest that the standard required of a patentee to carry back his date of invention should be far higher, as the temptation to perjury is considerably higher.

We submit that the testimony of Oldendorph fully supported by many documentary exhibits, including stipulated publications, the authenticity of which has not been questioned, is corroborative of these physical exhibits and is fully adequate to establish the fact of the Curtiss-Wright 19L, 23 and 21B airplanes, and the fact that they had identically the same camber and thickness relationships ascribed to the invention in suit.

Appellees' Dilemma as to Exhibit 25.

Appellees' Brief (p. 15) relies upon Plaintiffs' Exhibit 25 to illustrate the proposal by Garbell to Consolidated of the invention in suit and its alleged rejection by Consolidated. The District Court similarly relied heavily upon Exhibit 25, saying: "The fullest disclosure of the patent invention . . . bears the final rejection in a pencilled notation, 'Not (interested) at this time.' (Plaintiffs' Exhibit 25)" [Memo. Dec., R. 40.]

Exhibit 25 discloses a wing in which the camber of the airfoil sections at the tip and interjacent sections are identical. This is one type of wing taught by the prior art. Therefore, either: (a) Exhibit 25 establishes that the alleged invention of the patent in suit is the same as the prior art, in which case the patent in suit is invalid; or (b) Exhibit 25 does not teach the invention of the patent in suit, in which case it does not support the District Court's finding of rejection of the invention by Consolidated, and the judgment on the license issue must fall. The facts establishing the dilemma are as follows:

Exhibit 25, in the tabulation [R. 667], shows "proposals" No. 6 and No. 2, by Garbell. Proposal No. 6

suggests airfoil section 63, 4-222 at the root, section 65, 3-518 at 60% span (the "interjacent" section), and section 65, 3-514 at the tip. Similarly, proposal No. 2 suggests airfoil section 63, 4-222 at the root, section 63, 4-518 at 60% span (the "interjacent" section), and section 63, 4-514 at the tip.

As pointed out by Garbell with regard to defendants' Model 240 airplane in suit, in the N.A.C.A. "63" series of airfoil sections, the fourth digit indicates the design lift coefficient (one way of saying camber) Cli and the fifth and sixth digits indicate thickness ratio in % [R. 221-225]. This is supported by Plaintiffs' Exhibit 21 [R. 653], and is made plain in Garbell's report, DX-A [R. 1007-1070]. It is also fully described in the affidavit of T. P. Hall as a conventional engineering convention for indicating the geometry of wing foil sections as set forth in N.A.C.A. Technical Report 824 [R. 80-81]. These facts cannot be honestly denied by appellees.

It is therefore plain that in Garbell's proposal No. 6 of Exhibit 25, the mean-line camber indicated by the fourth digit "5" is the same at the interjacent section (60% span) and the tip, and that the thickness ratio indicated by the last two digits decreases from root to tip as 22%, 18% and 14%. Similarly, as to proposal No. 2, the fourth digit "5" is the same at both the interjacent section (60% span) and tip, whereas the thickness ratio decreases from root to tip as 22%, 18% and 14%. This is fully confirmed by the Hall affidavit [R. 80]. In each proposal, the root section camber is indicated by the

fourth digit "2," showing that the camber at the root is less than that at the tip and interjacent section.

Since appellees assert that Garbell's such proposals No. 6 and No. 2 of Exhibit 25 constitute a disclosure of the "invention" of the patent in suit, it is plainly admitted by appellees in effect that the "invention" includes any wing in which the camber of the interjacent section is the *same* as that of the tip, and the thickness ratio decreases non-lineally from root to tip. This, of course, is directly confirmed in the patent in suit, which plainly states that the camber of the interjacent section may have "a value *equal to* or slightly less than" "that of the tip section" [Col. 7, lines 66-71, R. 611]. Appellees' Brief (pp. 22-23) plainly admits that such a construction is disclosed in the Royal Aeronautical Society article [DX-WW, R. 903] and in the Zien article [DX-XX, R. 911], and this is fully substantiated by Appellants' Opening Brief (pp. 32-34, and Plate IV).

It is therefore submitted that appellees' admissions and contentions plainly establish that the structure of the alleged invention in suit is taught by the prior art, and, we say, the patent in suit is clearly invalid thereover.

On the other hand, if appellees attempt to avoid the consequence of invalidity over the prior art by reversing their position and now contending that Exhibit 25 does not disclose the invention of the patent in suit, then, we say, there is no evidence to support the District Court's findings and holding that the "invention" was rejected by Consolidated, and the judgment must fall on this ground.

There Was No Abandonment of the Infringement Defense.

Appellees' Brief (pp. 11-12) asserts that defendants "abandoned" the defense of infringement. This requires little reply, as, obviously, there was no such abandonment. Had defendants presented *no* evidence on the infringement question, they could still challenge the adequacy of plaintiffs' proofs on the issue.

Appellees' statement (p. 12) that "counsel for defendants have admitted the infringement of the patent in suit [Exhibit 21, R. 653]," is fallacious. At no time have counsel for defendants admitted infringement. Plaintiffs' Exhibit 21 [R. 653] referred to by Appellees' Brief shows on its face that it was written by Mr. D. A. Hall, who was in the Consolidated patent department [R. 326, 360]. Mr. Hall was not and never has been an attorney or counsel for Consolidated, as is well known to appellees' counsel. In any event, Exhibit 21 is not an admission of infringement, as it states: *"The teaching of the Garbell patent is not followed in the design of the Model 240 wing"* [R. 649].

Exhibit 21, additionally, positively establishes the fact that the stall of the Model 240 airplane is a *root stall.* It clearly states [R. 657] that: "the stall starts between the fuselage and the engine nacelle at about *15%* semi-span outboard of the root section." An examination of the plan view of the Model 240 airplane shown in the drawing thereof [R. 1000], shows that on such drawing the distance between root and tip is about 2-23/32 inches. 15%

of this distance is about 13/32 inch, which, measured outwardly from the wing root, would locate the point of stall origin almost directly adjacent the fuselage. Obviously, the Model 240 has a *root stall,* as testified to by the expert Ward [R. 419].

The License Issues.

Appellees' Brief does not deny our contention (Op. Br. pp. 22-24) that the alleged invention of the patent in suit was reduced to practice by Consolidated and its practicability fully demonstrated during the period of Garbell's employment. Appellees' Brief does not attempt to distinguish any of the authorities set forth in our Opening Brief (pp. 19-29) from the facts in the instant case or their application thereto, with the possible exception of the case of *Conway v. White,* 9 F. 2d 863 (C. C. A. 2d, 1925). The *Conway* case, however, supports our contention that an invention is "made" when it is reduced to practice, and appellees' brief does not contend otherwise. In particular, Appellees' Brief wholly fails to attempt to distinguish the case of *Hahn v. Venetian Blind Corp.,* 111 F. 2d 95 (C. C. A. 9th, 1940), which, we say, is directly in point on the issue as to when an invention is "made."

Appellees' Brief cites no contrary authority on the license issues, and, apparently, concedes that our statement of the relevant law is correct. Appellee cites *Pointer v. Six Wheel Corporation,* 177 F. 2d 153 (C. A. 9th, 1949). The question in that case was whether an invention was *joint* or *sole.* The Court held (p. 157): "Here the only basis for the claim of joint invention lies in the

fact that the Knox device was an addition to and improvement upon the Stebbins structure * * *." (P. 158): "Here there is no voluntary pooling of ideas. Knox's suggestions were rejected by Stebbins." Rejection of suggestions as disproving joint inventorship, is an entirely different question from and has no pertinency to the issue here.

We therefore submit that Appellees' Brief fails to answer our contentions as to the law and its application to the facts here, and fails to show that the District Court's findings on the license issue are supported in law or fact.

The Motion for a New Trial.

We believe that we have carried appellants' burden of establishing that the District Court's findings as to infringement are clearly erroneous on the actual evidence in this action (Op. Br. pp. 50-57). If this Court has any doubt that we have carried such burden, we suggest that the case should be remanded for the production of the evidence offered by affidavit in our Motion for a New Trial, which plainly establishes lack of infringement.

The public, as well as the parties, have a real and serious interest in the outcome of this litigation, as it vitally affects a large segment of the commercial aviation industry. The issuance of an injunction would ground several hundred commercial Convair aircraft operated by defendant American and others, to the obvious great inconvenience and loss to the public. The Court of Appeals for the Third Circuit, in *Sutherland Paper Co. v. Grant Paper*

Box Co., 183 F. 2d 926 (1950), in remanding a patent case for further proofs, aptly said:

> "Judicial inability to deal adequately with complex patent litigation has been much decried. See, *e. g.,* Borkin, The Patent Infringement Suit—Ordeal by Trial, 17 U. Chi. L. Rev. 634, 641 (1950). The difficulties inherent in adjudication in this field afford an additional reason for withholding appellate decision on an issue which can receive more thorough consideration and exposition on a new trial. The public interest in the proper determination of this litigation, as well as the interests of the litigants, impels us to refrain from decision on the issue of validity until we are as fully informed as possible."

From the District Court's remarks at the trial, it was obvious to trial counsel that no continuance for the purpose of further proofs would be granted. This is illustrated by the remarks of the District Court, as follows:

> "But if you insist on it, I will sustain the objection, but I *am not going* to take time *to adjourn* this case to have them produce that proof. I will give you *notice* of that *now.*" * * * "Time is getting valuable. I will have you *out of here* today." [R. 389.]

> "But I am *not* going to continue this case in order for you to do that. This case will *finish today* as far as the proof is concerned." [R. 395.]

We submit that in the absence of a full reversal in favor of defendants, this action should be remanded for further proofs.

Garbell's Uncorroborated Testimony Is Insufficient to Carry Back His Date of Invention.

In an attempt to answer our contention that the uncorroborated, oral testimony of a patentee is insufficient to carry back his date of invention (Op. Br. p. 20), Appellees' Brief (p. 41) argues: (a) that, under Section 1844 of the California Code of Civil Procedure, the testimony of one witness, if believed, is sufficient to establish any fact; and (b) that Section 1844 is binding on this Court in this action, under 28 U. S. C. A., Section 1652, and *must* be followed as to the uncorroborated testimony of Garbell as to his date of invention. This argument is obviously without legal merit, and is indicative of the basic weakness of plaintiffs' case on the license issues.

This action is brought under the patent statutes of the United States [Complaint, Par. III(a), R. 4]. The fact in issue is *when* Garbell made the invention of the patent in suit. Both the action and the issue for decision are obviously exclusively Federal in nature. Under such circumstances, the Federal law governs, and this Court should ignore any state statute in conflict with the general body of Federal law. (See: *United States v. Standard Oil Co.,* 332 U. S. 301, 67 S. Ct. 1604, 91 L. Ed. 2067 (1946); *Garrett v. Moore-McCormack Co.,* 317 U. S. 239, 63 S. Ct. 246, 87 L. Ed. 239 (1942); *D'Oench, Duhme & Co. Inc. v. Federal Deposit Insurance Corp.,* 315 U. S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942); *United States v. Lambeth,* 176 F. 2d 810 (C. A. 9th, 1949).)

Appellees' Brief makes no attempt to question our statement of the Federal law to the effect that the uncorroborated oral testimony of an inventor is insufficient, as a matter of law, to carry back his date of invention. We have cited a large number of cases to this effect in our Opening Brief (p. 20), and to the same effect, *see: T. H. Symington Co. v. National Malleable Castings Co.*, 250 U. S. 383, 39 S. Ct. 542, 63 L. Ed. 1045, at 1049 (1918).

It is respectfully submitted that the judgment should be reversed in its entirety.

Dated: February 28, 1952.

Respectfully submitted,

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No. 12,885

IN THE

United States Court of Appeals

For the Ninth Circuit

CONSOLIDATED VULTEE AIRCRAFT CORPORATION, a Delaware corporation, and AMERICAN AIRLINES, INC., a Delaware corporation,

Appellants,

vs.

MAURICE A. GARBELL, INC., a California corporation, and GARBELL RESEARCH FOUNDATION, a California corporation,

Appellees.

APPELLEES' PETITION FOR A REHEARING.

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FILED

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Appellees.

APPELLEES' PETITION FOR A REHEARING.

To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

A rehearing of this controversy is respectfully, but earnestly, requested by appellee. While the reasons upon which this request is predicated are hereinafter particularized, the principal ground urged by appellees is that the decision of this controversy by this

Court, resulting in a reversal of the judgment entered by the court below in favor of appellees, is, in our opinion, based upon an assumption of facts not justified by the record, and a misinterpretation of certain evidence.

The particular grounds upon which such rehearing is requested are hereinafter discussed under appropriate headings.

FOREWORD.

Inasmuch as the decision of this Court only considered the "shop-right theory", and reversed the trial court upon that ground, every point made in this petition is addressed solely to the shop-right question and the facts and law applicable thereto.

We respectfully draw the Court's attention to the fact that, although the judge of the lower court made findings of fact which were addressed to this issue, thus determining questions of fact based upon evidence which was without conflict in virtually each instance, given by witnesses whose conduct and demeanor while testifying he personally observed, no mention of or reference to these findings, is made in the statement of the case or the opinion of this Court.

The rule guiding this Court is, of course, that, unless the decision of the lower court upon the questions of fact involved was clearly erroneous, such determination is not to be interfered with.

We respectfully submit that this Court has inadvertently fallen into error in applying this rule, due

to an incorrect interpretation of certain evidence and the assumption of facts not justified by the record. We may, therefore, submit that appellees are entitled to ask the careful consideration of this petition presented to this Court as an appellate court which has reversed judicial ascertainment of the facts which were found by the trial court upon substantial and uncontroverted evidence.

Our duty, therefore, to this Court makes it obligatory in this petition to refer somewhat at length to the evidence. Our apology for the length of this petition is traceable to this circumstance.

I.

THIS COURT'S OPINION ON SHOP RIGHT.

The gist of this Court's opinion, as filed herein, is stated at pages 5 and 6 thereof as follows:

> "The evidence showed that, if Garbell ever made, developed or perfected his alleged invention, he did so by and through the use of materials and facilities of Consolidated and time for which he was paid by Consolidated. Therefore, irrespective of the invention agreement, Consolidated had a shop right with respect to his alleged invention."

This statement is predicated upon the two assumptions that the invention of Garbell was reduced to practice during the employment of Garbell by appellant Consolidated and at a cost to Consolidated. We

hereinafter will demonstrate that there is no basis for either of said assumptions in fact or in law.

A. THE LAW ON SHOP RIGHT.

In footnote 9 of this Court's opinion, certain cases are referred to in support of that portion thereof which is hereinabove quoted. These authorities all define the so-called shop-right rule and enumerate the various factors of which it is comprised. Naturally, we have no fault to find with these authorities, which hold, without exception, that a shop right arises in the case of employer and employee where:

1. The employee conceives or devises some process, method, or instrument;
2. Uses, or causes to be used, the property and other employees of his employer to develop, perfect or make and put into practicable form his invention;
3. Assents to or acquiesces in the use by the employer of such invention.

As was said in

Gill v. United States, 160 U.S. 426, at 430:

> "The principle is really an application or outgrowth of the law of estoppel *in pais,* by which a person looking on and assenting to that which he has power to prevent is held to be precluded ever afterwards from maintaining an action for damages."

If the work done by the employer does not add anything to the invention by way of developing it, or perfecting it, or putting it into practical form, or,

in other words, reducing it to practice, no shop right can arise. The same situation is true if the employee has no knowledge of user by the employer.

A mere demonstrational testing of the invention by the employer upon his own decision in order to determine if the invention will work as claimed is not enough. There must be a reduction to practice within the meaning of the authorities and an unmolested and notorious use before the patent is applied for.

Heywood-Wakefield Co. v. Small, 87 Fed. (2d) 716, 719 (Cert. Den. 301 U.S. 698);
Massie v. Fruit Growers' Express Co., 31 Fed. (2d) 463, 466.

B. FACTS PROVEN BY THE EVIDENCE.

The evidence in this case discloses a factual situation which completely eliminates the shop-right theory and demonstrates the absolute failure of appellants to carry the burden, which was entirely theirs, of proving the affirmative defense of shop right.

1. The invention here involved was devised and conceived by Garbell prior to his employment by Consolidated.

This fact needs no discussion, as the trial court so found and this Court concurred. (Opinion of this Court, p. 5.)

2. There was no development or perfecting of said invention by Consolidated during Garbell's employment by it.

(a) The invention.

To enable this Court to easily visualize the situation and evaluate the evidence hereinafter discussed, we

believe that the Court should understand that this invention does not call for a process, or a machine, or a design. Usually these items need work and trial-and-error methods; models need to be made; and so the development or perfecting of the invention progresses step by step.

Such is not the case here. Simply stated, the invention calls for the construction of a lifting surface (airplane wing) having three or more sections, by the employment of air foils selected according to the method explained in the patent, and thus achieving excellent and improved stalling characteristics. In other words, the Garbell wing is not as prone to lose its lifting power as wings of any other type in use under similar conditions, and the Garbell wing affords a ready and complete recovery to normal flight, where other types of wings lead the aircraft into a dangerous loss of altitude.

The invention was the final mental step of perfection following years of fundamental development work, all of which was done by Garbell prior to employment.

In order to have anyone skilled in the art construct a wing in accordance with the invention, it was only necessary for Garbell to give to him three air-foil numbers, denoting the selection of the air-foil family, and to designate the points at which they were to be used. (R. 279.) The air foils are designated by well-known NACA numbers and the interpolation of these from one section of the wing to the next is purely a

matter of computation, well understood and known to anyone skilled in the art.

Thus, all that was required to practice the invention was to construct a plane having such a wing and fly it. No development and no perfecting and no "trying" were necessary.

The undisputed fact is that no change, modification, development, correction or perfectioning was in fact made in the invention at any time after 1939. Appellant Consolidated used the invention directly as disclosed, proof that anyone skilled in the art could practice the invention from the original disclosure.

(b) No development or change.

It is inconceivable that appellants would not have produced evidence of changes made or development of the invention, if any there were. The only testimony whatever on this subject was introduced by appellees, such testimony standing alone, unchallenged, and uncontradicted. In testifying on this subject of improvement, Garbell said:

> "Q. Now, did any of these tests that have been referred to, these wind tunnel sections or these three-section wings, did they contribute in any way toward improvement or alterations in your invention or in perfecting it?
>
> A. No; no, absolutely not. If this is a criterion, there was no change from before to after. Even the first suggestion was complete, contained all the elements; nothing was modified.
>
> The Court. In other words, it is your contention that you added nothing to the conception

or the practical carrying-out of the invention by anything that you did during the employment with the defendant?

The Witness. That is right." (R. 461-462.)

Upon many occasions during his employment by Consolidated Garbell suggested or proposed the use of his invention in connection with some contemplated work. In testifying on this subject, Garbell gave evidence as follows:

"The Court. In other words, the conception preceded the work with this company, is that right?

The Witness (Garbell). Yes.

The Court. What you were doing here was not developed, but was merely suggesting that they adopt the conception?

The Witness. Yes.

The Court. A pre-existing conception.

The Witness. Yes. It was like stating—well, one person suggesting a flat roof for a building, and another one saying, 'Let's make it slope, so that the rain water will run off.' " (R. 280.)

And again:

"The Court. What you mean to say, however, is that these were not the working out of an idea, but merely putting the idea in writing and saying, 'That is my idea. Can you use it?'

The Witness. Yes." (R. 281.)

Not one word of testimony on this subject was put into the record by appellants, thus there is not even a conflict in the evidence. By reason thereof, we feel

that this Court is mistaken in believing that devlopment or perfecting of the invention took place during Garbell's employment by Consolidated.

(c) Proposals v. Final Plans.

As hereinabove stated, throughout the record there is evidence of the fact that during his employment by Consolidated Garbell repeatedly proposed or suggested the use of a wing falling within the meaning of his invention. These "proposals" were at the initial stage on any given project and never reached the final design of the airplane or wing then under consideration during Garbell's employment. The testimony above set forth properly characterizes these proposals.

A mere suggestion, one among many, is of no importance whatsoever on a shop-right claim. If the idea had been incorporated in the final design for a certain airplane, from which the airplane was to be built, and the inventor knew of such incorporation, he certainly would have been placed upon notice. Such is not the case here.

In no single instance was Garbell's invention ever placed in final design during his employment and with his knowledge. There is no evidence that it was ever carried into final design while he was employed by Consolidated.

This Court may very easily have been led into believing that Garbell aided in the preparation of final plans for one or more airplanes embodying his inven-

tion by reason of the unfortunate choice of words used by appellants' counsel in his cross-examination of Garbell. Repeatedly he kept using the phrase "plans or design for an airplane" (R. 243-254), when actually all he meant was preliminary reports or proposals.

The confusion was eliminated by action of the trial court as follows:

> "Mr. Frederick Lyon. Your Honor, please, I wonder why we can't have a definition of what he means by the words 'plans' and 'design'.
>
> The Court. I understand what he means.
>
> Mr. Frederick Lyon. The witness doesn't seem to.
>
> The Court. He means preliminary work by way of discussion.
>
> Mr. Gerlach. Yes." (R. 252.)

And again:

> "Q. (By Mr. Gerlach). And did you participate in making the plans for that aircraft, so far as the airfoil is concerned?
>
> Mr. Frederick Lyon. May we have a definition of what he means by the word 'plans'?
>
> The Court. It is evident to the witness. Let us go on from there.
>
> Mr. Frederick Lyon. May we ask the witness if the question is evident on that word?
>
> The Court. He is answering. He understands it. Go ahead. It means any step that was taken. He doesn't mean blueprints.
>
> The Witness (Garbell). A suggestion proposal.
>
> The Court. A suggestion or proposal; yes." (R. 254.)

Appellants introduced several reports into evidence which contained proposals by Garbell for the use of his wing, such as defendants' Exhibits A, B, C, etc. In referring to these exhibits, Garbell was asked whether it was a design for an airplane. This answer was given:

> "A. No. It is a suggestion, of which usually there are at least two or three or four, and the plans of the airplane are eventually decided from any of this number of preliminary suggestions.
>
> Q. As far as the work of proposing the use of your invention was concerned, what part of one of these so-called proposals is that?
>
> A. That is the smallest part.
>
> Q. Actually, it is just a suggestion of using three particular airfoils?
>
> A. Yes.
>
> Q. There is no mathematics, no computations or anything else required to make such a proposal, is there?
>
> A. Very little. Well, usually I did them at home, because it was the only place where it was quiet.
>
> Q. It is the same thing as if you proposed to the purchasing department that they buy one kind of an automobile over another kind, isn't it?
>
> A. Yes." (R. 279-280.)

3. There was no reduction to practice of said invention by Consolidated during its employment of Garbell of which he had notice or knowledge.

In order to have brought themselves within the shop-right theory, it was encumbent upon appellants to have proven the construction of the invention (re-

duction to practice) with the knowledge and consent of the inventor and that such construction was made in order to perfect, develop or use the invention. It is not enough if such construction was for a demonstrational test only, made by the employer for his own information and knowledge, nor if such construction did not fully and completely utilize the invention.

(a) Models involved.

This Court, in reaching the conclusion expressed in its opinion, obviously assumed that some of the models constructed and run through wind-tunnel tests constituted a reduction to practice. Such an assumption is not supported by the evidence.

At this point, an enumeration of the structures involved would be helpful.

In point of time, but three aircraft proposals can or do have any bearing on this case. They are, in the order of their appearance: (1) The two-engine tailless; (2) the XB-46; and (3) the Model 110.

Garbell left the employ of Consolidated on October 15, 1945.

The two-engine tailless never went past the model stage and was then abandoned, so models only are involved.

One airplane of the XB-46 type was built and flown, admittedly after 1946, long after Garbell's employment had terminated, so models only are involved.

One airplane of the Model 110 was built and flown subsequently to the XB-46, so for the same reason models only are concerned.

The accused airplane, Convair 240, did not come into the picture until after Garbell had left Consolidated, so no part is played by it in the shop-right theory.

(b) Model types.

The evidence in this case discloses that models were made for testing in a wind tunnel, such tests to be for diverse purposes; that some models were immovably fixed to a base for static observation only, hence called "static"; that some models were made so they could be actually flown in the wind tunnel and thus truly be "completely operating model"; that some were made to test wings and some were made to test appendages, such as nacelles, control systems, etc.

We submit that for a structure to fall within the shop-right theory, it must contain all of the elements of the invention and fully operate, so that the teachings of the invention can be demonstrated, otherwise there is no "use" made of the invention, and it is not reduced to "practicable form" within the meaning of the authorities. Therefore, only those free-flying, fully operating models can be considered, for, obviously, it is impossible to demonstrate and reduce to practice the invention by using a model limited in scope, such as a "static" model. Freedom of movement and the availability of operating controls are vitally necessary to

demonstrate the RECOVERY of the aircraft from a stall, which recovery is afforded by the Garbell wing. Such a model was never built by Consolidated.

(c) The two-engine tailless.

The testimony of Garbell for appellees and Bayless for appellants is in full accord on this subject and without conflict. As such testimony pertains to models, it may be summarized as follows:

Three models were built.

The first was a static wind-tunnel model with a two-section wing. (Not Garbell's wing.)

The second was made for studies of the nacelles and fuselages, wing-tip fins and the extensible front and rear surfaces and flaps, all embraced within an invention by one Sutton, which invention Consolidated had acquired. This model had a three-section wing (Garbell's), which was used in order to get some variation from the first model, so that additional information on all the auxiliary controls and appurtenances could be obtained. (R. 454.) This was NOT an operating free-flying model.

The third model was a free-flight model, which was to be tested in the NACA free-flight wind tunnel. This had a two-section wing. (Not Garbell's wing.) (R. 256-7, 454-6, Garbell; R. 322-3, Bayless.)

From the foregoing two things are apparent and neither is any aid to the shop-right theory. First, no operating model of the invention was made. Second, Consolidated used the static model to test and develop

its own ideas on control surfaces and other appurtenances only; no tests were made to experiment with the Garbell wing.

(d) The XB-46.

Although the defense of shop right is an affirmative defense and the burden is on the defendant to prove it, not upon the plaintiff to disprove it, appellants introduced no testimony concerning models made. The record shows nothing but an unqualified, bare statement by appellants' witness Bayless that Garbell made his usual suggestion and it was incorporated.

The real facts were placed in the record by the appellees. Their testimony was in no way challenged. The only model made by Consolidated was a static wind-tunnel model which was made and used to test other things on the model but not its wing, which wing followed the Garbell suggestion. Following this model, Consolidated built a full-scale mock-up which incorporated a two-section wing. (Not Garbell's wing.)

The true situation is readily grasped from the following:

> "Q. Now you heard Mr. Bayless testify that there were wind tunnel models made for the XB-46. What did he tell you concerning the cost of these at the time they were made?
>
> A. It was exactly the same thing again. The company had available, or would have available within a matter of weeks, test data provided free by the Government through the National Advisory Committee of Aeronautics on 2-section wings of the type needed, and placing such a wing on the

model would have been a duplication. The tests that were contemplated were intended and actually came out to be primarily tests of air intakes, nacelle afterbodies, stability and control and control forces, that is, control effectiveness and control forces, and flaps and—well, the tests came out exactly that way.

On one occasion Mr. Bayless found it even necessary to go to the Massachusetts Institute of Technology to do the necesary development work, which is crude, it is in the wind tunnel, on flaps in order to provide adequate elevator effectiveness." (R. 458, Garbell.)

"Q. And did they ever build an XB-46 while you were employed by them?

A. No, the only thing they had was a full-sized mock-up, that is, one to determine spaces, etc., and the mock-up wing, I looked at it very closely in the experimental factory, had a 2-section wing." (R. 459, Garbell.)

On cross-examination, Garbell testified:

"Q. Now was an airplane built according to the plans or proposal of the XB-46?

A. Yes, an airplane was built but long after my leaving, and a mock-up was roughed out at a time when the management apparently planned to go ahead and that mock-up had a 2-section wing down the experimental hangar. And I was told, on as late as May 5, 1949, by Mr. Bayless, at 7:30 p.m. in the lobby of the Statler Hotel, while he was waiting for Hugh Freeman of the NACA, that at the time when I resigned and for a considerable time after that the management made it

very clear that they would have no part in the production and building of that aircraft.

Mr. Gerlach. I move to strike the last part of the answer.

The Court. No.

The Witness. Because that was entirely in agreement with what I knew at that time.

Q. (by Mr. Gerlach). An airplane was built?

A. Yes.

Q. The XB-46?

A. Yes.

Q. From the proposal?

A. Yes.

The Court. Let us find out the time. When was it built?

The Witness. That I don't know, your Honor.

The Court. It wasn't built while you were there?

The Witness. No.

The Court. I gathered that from what you said.

A. A mock-up was built, which did not incorporate my work.

The Court. I see." (R. 255-6.)

Certainly this evidence is a far cry from the proof of user so sorely needed by appellants. In the light most favorable to appellants, the testimony of Bayless creates only a slight conflict, certainly not one which would empower this Court to ignore the determination of the trial court.

(e) **The Model 110.**

As in the case of the XB-46, appellants put in no testimony whatsoever on the Model 110 save and except the statement by their witness Bayless that according to his recollection Garbell was still with Consolidated when early designs on the Model 110 were in progress. (R. 300.)

Garbell testified that he suggested the use of his wing for the Model 110 (R. 275; 467), and also:

> "Q. Did you ever do any work on the Consolidated Vultee 110?
>
> A. No work, no.
>
> Q. Did you ever correct any mistakes that others might have done on that?
>
> A. Yes, through suggestions. I understood that the effect of the propeller slipstream on the longitudinal stability was quite terrible, it was way beyond what the CAA could have possibly tolerated, and I suggested tilting the nacelles 5 degrees to reduce that effect.
>
> Q. Was this on a model or on a full-sized plane?
>
> A. No, on the model.
>
> Q. Did you ever know until after your employment was over that they built a 110?
>
> A. No.
>
> Q. Did they tell you they were going to build one?
>
> A. No.
>
> Q. Did they lead you to believe that they were going to build one?
>
> A. No, it was supposed to be a dead duck.
>
> Q. They said that?
>
> A. Yes." (R. 458-9.)

From the testimony adduced at the trial, it is apparent that, as far as the construction of models is concerned, we are confronted with nothing more than incomplete demonstrational tests, which could not possibly affirm or disprove the claims of the invention, which were abandoned prior to Garbell's termination of employment and which could in no possible way be construed as reduction to practice.

(f) Garbell reduced invention to practice before employment.

There is still another point to be considered on the question of reduction of the invention to practice, the evidence of which stands alone and unchallenged.

It will be recalled that Garbell entered the employment of Consolidated on September 7, 1942. (R. 211.) Prior thereto, and during the summer of 1939, he met Dr. Robert C. Platt, then a leading aerodynamicist for the National Advisory Committee for Aeronautics, at Elmira, New York. At this meeting, Garbell described and explained the invention now set forth in the Garbell patent to Dr. Platt, including all essential elements of the patent in suit. Dr. Platt fully understood both the principle of operation and the structure invented by Garbell. This meeting of Garbell with Dr. Platt was followed by correspondence passing between Garbell and one Dr. George Lewis, then Director of the Aeronautical Research of the NACA. (R. 199-202.)

In October of 1939, Garbell became employed as an instructor at the Boeing School of Aeronautics, Oakland, California. While there, he met and became ac-

quainted with an aeronautical engineer by the name of Harry Bradford Chin, who was then instructing in aircraft design at the Boeing School. Some time in the Fall of 1940, during one or more discussions, Garbell thoroughly described his invention to Chin and made drawings and sketches to explain and illustrate his invention to Chin. Both the principle of operation and the structure invented by Garbell were fully understood and appreciated by Chin. (R. 202-207.)

It is the contention of appellees that the invention here involved belongs to that category of inventions complete in and of themselves, and that it only takes the explanation thereof to anyone skilled in the art to enable the invention to be reduced to practice. This, of course, is the so-called constructive reduction to practice, but the courts, in certain instances, have upheld the theory of constructive reduction to practice over a physical reduction to practice. We believe that this is one of those instances.

As was said in the case of

Curtiss Aeroplane & Motor Corp. v. Janin (CCA 2), 278 Fed. 454, 456:

"Reduction to practice is not merely a matter of construction, building and trial, but may consist in a disclosure of the idea by any kind of description, pictorial, verbal, or written, which will enable one skilled in the art to make and use that which is disclosed. We think a drawing may possibly be a sufficient reduction to practice and an experimental machine insufficient, for the question is one of degree, and the ultimate test is al-

> ways whether the inventor has shown operative means to that theoretically omnipresent person, the man skilled in the art."

Admittedly, if appellants were making some claim to the invention or we were involved with an interference proceeding under the patent laws, the constructive reduction to practice by statements and drawings would not be sufficient to protect the inventor. However, as against the defense of shop right, it is entirely sound in principle.

Furthermore, the evidence above referred to, standing alone and uncontradicted as it does, gives concrete support to the finding of the trial court, and which finding this Court declares to be clearly erroneous, that the reduction to practice of Garbell's invention took place prior to his employment by Consolidated.

4. The employer's cost question.

As part of the shop-right theory, and in keeping with the equitable principle that one should not gain at the expense of another, the employer must prove that he was put to cost and expense, his employees were used, and he furnished materials, all in the construction of the employee's invention, which he would not otherwise have done. This Court has assumed such a situation in this case, but it is an assumption without foundation.

The simple fact is that the appellants failed to place into the record any evidence whatsoever on the question of costs, even though the defense of shop right is

an affirmative defense and the burden was upon them to prove every component part of that special defense.

We have demonstrated hereinabove, from an analysis of the evidence, that the models made by Consolidated were so made for its own express purposes and by its own direction, upon its own idea, and to test and evaluate its own nacelles, control surfaces and other appurtenances, but not the Garbell wing. Under such circumstances, no additional cost was incurred by Consolidated. Obviously, some wing had to be placed on the model to serve as a test platform for these other component parts. No operating, free-flying model of the Garbell wing, with its attendant cost, was ever made.

It does seem to us, however, that the complete absence of any evidence or proof of costs expended by the defendants creates a fatal weakness in a defense predicated upon the shop-right theory.

True, Garbell was under salary and his time was devoted to his employer. There is no evidence of his spending his employer's time working on his own prior invention. It was fully conceived and devised when he entered Consolidated's employ, and is used in the accused device in its unchanged, original form. As has been pointed out, all that was necessary to construct a wing according to the invention was to specify three air-foils by camber and thickness ratio. Even this small matter was, according to the uncontradicted evidence, worked out by Garbell at home and not on company time. (R. 279-280.)

During the trial, reference was made to reports upon which Garbell worked, which gave the results of wind tunnel tests of various models, obviously for the purpose of seeking or attempting to create the impression that cost and expense were incurred by the company, although there is no mention of a five-cent piece in the entire record. From the analysis of the evidence already given in this petition, it is self-evident that the necessity for the tests and the reports was not the Garbell invention, but the multitudinous tests that Consolidated found necessary to make concerning other items connected with the planes in question, such as flaps, control systems, nacelles, etc., etc.

Strangely enough, and as in other instances already pointed out, the only evidence on this question was introduced by appellees. Garbell testified as follows:

> "Q. (Mr. Frederick Lyon): Did you ever work out the details of how to make a wing of this kind and present the details to Consolidated, in detail, at their expense?
>
> A. No." (R. 280-281.)

Using the second static model of the two-engine tailless as an example, Garbell testified as to the method of construction of a two-section wing and his three-section wing, stating:

> "Q. What kind of wing did that model have?
>
> A. That was the wing, according to my suggestion—I mean, well, I was told that merely to repeat the other wing would have been a duplication. The old model had dried out in the wind tunnel, as they usually do, and started cracking.

> Inasmuch as these additional tests were designed to obtain information on all of the appurtenances and control devices there was no cost incurred, and, therefore, it was all right to include my suggestion.
>
> Incidentally, I might mention, that just because my suggestion includes three sections—the other one, two—that still doesn't make any difference in labor, because it is impossible to build a model, even a two-section model, simply by cutting out two sections and then letting the milling machine run beween the two, because the block of wood bends. It is necessary, therefore, to make 5 and 7 and 9 intermediate sections, even though following a straight-line fairing, and then do the hand work between the sections. Regardless of how many aerodynamic control sections there are, the work is still the same, even on a so-called two-section wing." (R. 454-5.)

If this testimony had been not in accordance with actual fact, appellants would have introduced evidence upon the subject. Garbell was not even cross-examined on his statements, hence they stand as established fact in this case.

5. **As soon as Garbell learned Consolidated was using his invention, which was after his employment had terminated, he placed Consolidated upon written notice of violation of his then pending patent application.**

The one remaining question under the shop-right theory is this: What did the inventor do when he first learned his former employer was using the invention?

The evidence discloses the fact that Garbell terminated his employment with Consolidated in October 1945. Thereafter, about July 18, 1946, he learned that Consolidated was then manufacturing and building its Convair 240, which is the accused device involved herein.

On August 5, 1946, and on August 12, 1946, Garbell addressed communications to Consolidated and advised that company that it was using the subject-matter of an invention upon which a patent application was then pending. (R. 217-218; Pltffs. Exh. 17, R. 638.)

The inventor and former employee took immediate steps to place his former employer upon notice once he had learned of the fact that the former employer was for the first time using his invention. There was no sleeping on his rights, and he did not allow the user to go on without notice and expend further sums in construction.

Thus, in this instance, as in all the others, we find the complete failure of operation of the shop-right theory.

The attention of this Court is also directed to the fact that no claim of shop right was ever advanced, intimated or made by Consolidated from the date of Garbell's employment in September 1942 until an exchange of correspondence between Consolidated and Garbell subsequent to Garbell's placing Consolidated upon notice in August of 1946.

The testimony on this subject is very clear and the appellants have not contended otherwise. (R. 236-237.)

II.

THE COURT'S OPINION ON THE INVENTION AGREEMENT AS IT PERTAINS TO SHOP RIGHT.

In the forepart of the decision as rendered by this Court, particular attention is paid to the Invention Agreement executed on or about September 7, 1942, by Garbell and Consolidated. In analyzing the agreement and the evidence pertaining thereto, this Court concurred in the opinion of the trial court that Consolidated had taken no steps, as provided for in the Invention Agreement, toward acquiring the invention here involved, and, therefore, had waived whatever right Consolidated may have had to acquire Garbell's invention or the patent issued thereon.

The effect, however, of this Court's decision is that Consolidated acquired a shop right under said agreement by reason of the terms thereof, and particularly those provisions referred to in paragaph 6 of said agreement. Such a conclusion can only be predicated upon the assumption that a disclosure of Garbell's invention was made to Consolidated under said Invention Agreement. The court is in error in making such an assumption, as the evidence discloses:

(a) that the Invention Agreement did not operate upon or in any way affect the invention involved herein; and

(b) that no disclosure was made by Garbell to Consolidated of said invention under the terms and provisions of said Invention Agreement.

These two points will now be discussed in the order in which they are above referred to.

A. THE INVENTION AGREEMENT DID NOT OPERATE UPON OR IN ANY WAY AFFECT THE INVENTION INVOLVED HEREIN.

The crux of the agreement lies in subparagraph (a) of paragraph 1, where a limitation is placed upon the operation of the agreement. The pertinent language is to the effect that the employee agrees "to disclose promptly in writing * * * all inventions * * * made, developed, perfected, devised, and conceived by the employee * * * during the employee's employment by the Company."

Inasmuch as the trial court and this Court have determined that the invention was *devised and conceived* by Garbell prior to employment, the agreement can then only operate in this particular case on an invention *made, developed or perfected* during employment. In the consideration of the particular point now being made by appellees, the attention of the court is respectfully, but earnestly, directed to the presentation of points and the evidence therein set forth contained in the forepart of this petition under the following headings:

"B. Facts Proven by the Evidence."

"2. There was no development or perfecting of said invention by Consolidated

during Garbell's employment by it." Page 5, supra.

"3. There was no reduction to practice of said invention by Consolidated during its employment of Garbell of which he had notice or knowledge." Page 11, supra.

If the court will again address itself to the evidence referred to and set forth under the respective points just enumerated, we are satisfied that this Court will then realize that the invention was *not made*, it was *not developed,* and it was *not perfected* during Garbell's employment.

The uncontradicted evidence is to the effect that Garbell, during the time he was employed by Consolidated, did not *make, develop, perfect,* or in any way *change, modify* or *add to* the conception of his invention, which he possessed prior to the time he became employed by Consolidated. The evidence referred to in the forepart of this petition, and hereinabove designated, definitely and unequivocably proves that Consolidated did *not make, develop or perfect* said invention; hence, the charge of collaboration between Garbell and the employees of Consolidated, should such a charge be advanced, will fall of its own weight.

It is apparent then, that inasmuch as Garbell's invention was *not made, developed, perfected, devised or conceived* by Garbell, either solely or in collaboration with others, *during* Garbell's *employment* by Consolidated, the Invention Agreement cannot have any effect whatsoever upon this particular invention. Under

such circumstances, it is absolutely impossible for Consolidated to have acquired a shop right, or any other right.

B. NO DISCLOSURE WAS MADE BY GARBEL TO CONSOLIDATED OF SAID INVENTION UNDER THE TERMS AND PROVISIONS OF SAID INVENTION AGREEMENT.

1. Garbell's knowledge of patent procedure of Consolidated.

The record in this case shows that Consolidated maintained at all times during Garbell's employment a Patent Department, and had a well-established system set up whereby ideas and inventions made or conceived by an employee could be submitted to the company under the Invention Agreements previously signed by each employee. The procedure adopted by the company and followed by it is completely outlined in the testimony of appellants' witness Walter J. Jason, Assistant Patent Director of Consolidated (R. 351, et seq.). From such testimony, and from the Invention Agreement itself, the consecutive steps taken were as follows:

(a) A written disclosure made by the employee to the Patent Department;

(b) Within a period from one to four weeks thereafter, the employee would receive a written notice advising him of receipt of the disclosure, the docket number assigned to it, and that he would be advised of the results of the company's investigation;

(c) If the company, after investigation, considered any invention patentable, the inventor was paid the sum of $10.00;

(d) If the company elected to acquire the invention, written notice of that fact was sent to the inventor;

(e) Thereafter the employee would be requested to execute two forms:

1-80-39 "Notice of Election to Acquire Invention"

1-80-42 "Assignment of Invention"

(f) As an alternate step, should the company believe the invention to be unpatentable, or should it elect not to acquire it, written notice was sent to the inventor, telling him of that fact and stating that the case was being placed in the inactive file of the company; in addition, the inventor was advised that he could have a release if he so desires.

Within not too long a period after his employment, Garbell, at the suggestion of Bayless, his superior, went to see Donald Hall, who was then in charge of the Patent Department of Consolidated. Hall explained to Garbell the functions of the Patent Department and how it operated, especially with reference to the Invention Agreement (R. 447-448).

Thus, Garbell obtained full knowledge of the operation of the Patent Department and the Invention Agreement, the method involved in submitting a disclosure under the Invention Agreement, and what was expected of him and what he could expect from the company.

2. Disclosures made by Garbell to Patent Department.

Between March 29, 1943, and April 30, 1945, in accordance with the said Invention Agreement, Garbell formally submitted to Consolidated seven disclosures, which covered the following alleged inventions:

1. Slotted Armor Plate.
2. Retractable Tail Surface.
3. Hydrofoil for Airplanes.
4. Wing Tip Fin.
5. High-speed Air Intake.
6. Dropable Jet Augmenter.
7. Longitudinal Control for Jet Aircraft.

All of these disclosures were duly docketed by Consolidated and duly given numbers within a short time after their submission (R. 353). Thereafter, the procedure as outlined in the Invention Agreement was followed and the successive steps taken by Consolidated. The situation is characterized by the following testimony of Garbell:

> "Q. Whenever you made a disclosure to the corporation in writing other than with reference to this invention before this court, were you immediately paid by Consolidated for that suggestion?
>
> A. The immediate step was to follow a certain procedure, that is, regarding inventions that did fall under the Invention Agreement, followed by the payment provided for in the Invention Agreement.
>
> Q. And you were always paid on these suggestions?

A. On most of them, of those that were given consideration, yes, and the payment was prompt." (R. 283.)

The testimony discloses that of the seven disclosures made by Garbell to Consolidated two of them were accepted by the company. These were the hydrofoil for airplanes and the high-speed air intake. Thereafter, the various payments called for by the Invention Agreement were made, and eventually Garbell executed the assignments, etc., as called for by the agreement. In the case of the disclosure for an alleged invention for slotted armor plate, Consolidated did not accept the invention, notified Garbell to that effect, and duly executed a release under date of February 24, 1944. (R. 316-322.)

There is no question but that Garbell, on the one hand, and Consolidated, on the other, knew what was expected of each under the terms of the Invention Agreement, and the procedure which was to be followed, had been followed, and would be followed.

3. The alleged disclosure of the invention in suit.

In December 1944, Garbell prepared a scientific paper for presentation to the Institute of Aeronautical Sciences. Such paper was prepared upon the request of his superiors, T. P. Hall and Bayless, under direction that the subject-matter was to be on some scientific matter, but eliminating anything of military significance and likewise eliminaing anything that would tend to disclose actual company activities. (R. 289-290, Garbell; R. 301, Bayless.)

In the conversation which T. P. Hall had with Garbell, he suggested that Garbell write about his wing. (R. 290.)

The document in question, as prepared by Garbell and sent by Consolidated to the Institute of Aeronautical Sciences as a technical paper, was introduced in evidence by appellants, as their Exhibit D, during their cross-examination of Garbell. In characterizing the paper so prepared by him, Garbell testified:

> "Q. (By Mr. Gerlach): Does Exhibit D contain a description and illustrations exemplifying your patent in suit?
>
> A. It contains a very broad scientific explanation of the basic principles.
>
> Q. It contains descriptions and it contains drawings which, to some extent, follow the drawings of your patent, do they not?
>
> A. Broadly speaking, yes." (R. 269.)

If this Court will take but a moment to glance at Plaintiffs' Exhibits 26 (R. 669-676) and 27 (R. 677-683), it will immediately observe that there is absolutely no similarity between actual disclosures to the Patent Department of Consolidated and the scientific paper (Defendants' Exhibit D, R. 775). It is not, nor was it intended to be, a "disclosure" within the terms of the Invention Agreement.

4. Neither Garbell nor Consolidated considered the paper to be a "disclosure" under the Invention Agreement.

In seeking the proper interpretation to be placed upon a contract, agreement, or state of facts, the

courts have long looked toward the actions of the parties themselves with regard thereto, in order to give a practical construction to the matter upon which the court has to reach a decision. Such procedure applied to this case gives abundant proof that neither Garbell nor Consolidated ever believed that the scientific paper prepared by Garbell at Consolidated's request was a disclosure of an invention under the Invention Agreement.

(a) As to Garbell.

This Court will readily appreciate that, by reason of his talks with Consolidated's Patent Department representatives and the many occasions during his employment Garbell submitted disclosures to Consolidated specifically acting under the Invention Agreement, he was thoroughly and completely familiar with what was required of him by way of form of submission of an idea, drawing, etc., and that he was required to be as specific as possible with relation to every phase of any such disclosure. Likewise, Garbell was thoroughly familiar with the steps, preliminary or otherwise, which Consolidated took with reference to a disclosure made to it under the Invention Agreement by an employee; and that this would result in patent studies, search of prior art, and conferences with Consolidated's Patent Department.

In this particular instance, he was requested by his employer to prepare a scientific paper, to be a contribution on Consolidated's behalf to the annual meeting of the Institute of Aeronautical Sciences.

Pursuant to his instructions not to use anything of a military nature or write about a subject which was involved with or as a company project, and following the suggestion of his superior that he write about his (Garbell's) wing, the paper in question was prepared in December of 1944.

While Garbell knew that this was not a paper prepared for a disclosure of an invention, he did realize that for the first time he was releasing for presentation to the public enough material and data concerning his invention, all of which might easily detrimentally affect any application for a patent which he might thereafter make.

Having in mind that during the two preceding years of employment he had become thoroughly familiar with the dangers of public release of patentable ideas, Garbell knew that he should take some steps to protect himself. Therefore, with the sole purpose in mind of protecting his patent rights, he transmitted a copy of the paper, as prepared, to D. A. Hall, a patent engineer of Consolidated, accompanying the same with an interoffice memorandum in which he stated that he was making an official disclosure (patentwise) of invention. Considering the circumstances which then existed, and the conditions under which the paper was prepared, the language of his memorandum to Hall would, to Garbell's mind, act as a red flag to Consolidated and direct their attention to the fact that he had exclusive property rights in the invention described in the paper.

courts have long looked toward the actions of the parties themselves with regard thereto, in order to give a practical construction to the matter upon which the court has to reach a decision. Such procedure applied to this case gives abundant proof that neither Garbell nor Consolidated ever believed that the scientific paper prepared by Garbell at Consolidated's request was a disclosure of an invention under the Invention Agreement.

(a) As to Garbell.

This Court will readily appreciate that, by reason of his talks with Consolidated's Patent Department representatives and the many occasions during his employment Garbell submitted disclosures to Consolidated specifically acting under the Invention Agreement, he was thoroughly and completely familiar with what was required of him by way of form of submission of an idea, drawing, etc., and that he was required to be as specific as possible with relation to every phase of any such disclosure. Likewise, Garbell was thoroughly familiar with the steps, preliminary or otherwise, which Consolidated took with reference to a disclosure made to it under the Invention Agreement by an employee; and that this would result in patent studies, search of prior art, and conferences with Consolidated's Patent Department.

In this particular instance, he was requested by his employer to prepare a scientific paper, to be a contribution on Consolidated's behalf to the annual meeting of the Institute of Aeronautical Sciences.

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Nothing further was done by Garbell, nor was there anything required of him to be done. He had protected his rights in an invention which he had at all times possessed long before entering his employment with Consolidated.

(b) As to Consolidated.

First of all, there is, of course, the fact that Consolidated requested the preparation of the paper, not as an invention disclosure and not with that thought in mind, but so that the company would have a paper presented on its behalf at the next meeting of the Institute of Aeronautical Sciences. It is apparent that, with T. P. Hall's suggestion to Garbell that the article be written concerning Garbell's wing, Consolidated knew that the wing was not a company project nor involved as such.

A copy of the paper, with its memorandum of transmittal, which, in effect, put Consolidated upon notice, was received by D. A. Hall, a patent engineer of Consolidated. Thereafter not one step under the Invention Agreement was taken by Consolidated. In the forepart of the second division of this petition, we have listed the procedure to be followed under the Invention Agreement, and that procedure was followed in all cases, not only with relation to all ideas which Garbell had submitted under that agreement, but it was the regular, usual and adopted practice that was followed in every case, according to the testimony of Consolidated's patent attorney, Jason. (R. 351-359.)

Garbell's written memorandum to Consolidated ransmitting the copy of the paper in question bears late December 9, 1944. Under the Invention Agreenent, a docket number is given a submission of invenion by an employee, and he is advised thereof by etter within thirty days after the submission of the dea. The records of Consolidated show that it assigned a docket number to the scientific paper on or ıbout January 24, 1946 (R. 354, Jason), which is over a year after it had received the paper and nonths after Garbell had terminated his employment vith Consolidated.

Consolidated, between December 20, 1944 and Janıary 24, 1946, had, obviously, taken no steps concernng this matter. Once the docket number was given his paper, nothing further was done except to mark t "Inactivated". Not a communication was sent to Garbell. Garbell had not appeared at the Patent Department. (R. 360.)

Mr. Jason, Consolidated's assistant patent director, testified that "no report of any kind was ever sent to Dr. Garbell either of the submission of that idea to the Patent Department or to advise him that the Patent Department was processing that matter". (R. 363.)

To further highlight this matter, the record discloses that on March 26, 1947, and April 7, 1947, the Patent Department of Consolidated wrote Garbell, at his then address, advising him that the company was inactivating Garbell's disclosure of high-speed air

intake, made on November 17, 1944. (R. 365; Plaintiffs' Exhibits 31 and 32, R. 692, 693.)

Consolidated did not advance any claim of shop right or license at the time that it received the scientific paper, which it now contends is a disclosure under the Invention Agreement, nor did it advance such a claim at any time until after Garbell had advised it that it was using his invention, in the fall of 1946.

On August 5, 1946, Garbell wrote to Consolidated concerning the use by them of his invention and notifying Consolidated that application for letters patent was pending. (R. 638, Plaintiffs' Exhibit 17.) On August 9, 1946, Consolidated answered said letter, stating, in part, as follows:

> "We will accept a copy of the patent application to which you refer for the purpose of a disclosure, on the basis that in so doing the disclosure is made to us without obligation * * *" (R. 641, Plaintiffs' Exhibit 18.)

It is perfectly apparent that Consolidated was asking for the first time for an official disclosure and was not making any claim of shop right.

In answer to Consolidated's letter, Garbell, on August 12, 1946, wrote Consolidated and referred them to his paper appearing in the February 1946 issue of the Journal of the Aeronautical Sciences, as a document which stated the basic principles underlying his invention. (R. 639, Plaintiffs' Exhibit 17.) It is to be noted that this was the publication of the

scientific paper prepared for that purpose by Garbell in December 1944, while with Consolidated.

Following receipt of Garbell's letter under date of August 12, 1946, and just referred to, Consolidated, for the first time, took the position that the scientific paper written in December 1944 constituted a disclosure of invention under the terms of the Invention Agreement and that it had a shop right.

Just before Garbell left the employ of Consolidated, in October 1945, he had a conversation with D. A. Hall above referred to, who was the patent engineer to whom Garbell had sent the copy of the scientific paper nine or ten months before. During that conversation, no mention was made to Garbell of the matter now before the Court, and no shop right or other right was even intimated. (R. 449.)

One last fact concerning the acts of Consolidated is called to the attention of the Court, as it sums up the entire matter. Under direct examination, Garbell testified:

> "Q. At any time did they inform you that they intended to use this invention of yours?
>
> A. No.
>
> Q. They never led you into the opinion they intended to use it?
>
> A. No.
>
> Q. Did they completely reject this invention at all times?
>
> A. Yes, in each case.
>
> The Court. During any of those conversations, was anything ever said to you regarding shop

rights, regardless of the merit, such as, 'If it is any good, it is ours, anyway'?

The Witness. No.

The Court. Was any such claim made during these conversations?

The Witness. No.

The Court. When did you hear for the first time that shop rights were being claimed?

The Witness. After I directed my correspondence to the company, immediately following application.

The Court. Filing of your application." (R. 236-237.)

From all of the evidence, which is uncontradicted, it must be obvious to this Court that the principals in this matter did not ever consider or look upon the scientific paper in question as a disclosure under the Invention Agreement. This is amply demonstrated by their actions, as hereinabove reported.

III.

LAW ON "REDUCTION TO PRACTICE".

In its opinion, this Court, in Footnote No. 7, cited some authorities in support of a legal proposition stated thusly:

> "An invention is not made, developed or perfected until reduced to practice."

There is no question that this is the law in cases of interference or infringement where the contest is be-

tween two persons each claiming to be the inventor or the assignee thereof. We submit that the legal proposition just referred to has no application in the case at bar, which is purely and simply one of infringement, with the defendant setting up a defense of shop right, rather than seeking any title to or interest in the invention or patent.

The situation just referred to is ably set forth by the Court in its opinion rendered in the case of

> *Heywood-Wakefield Co. v. Small* (C.C.A. 1), 87 Fed. (2d) 716.

There an employee, during the time he was employed, invented a reversible car seat. Upon showing a cardboard model to his employer, the employer ordered a full-scale seat to be made up. Subsequently an action was brought by the inventor, who had obtained a patent against his former employer, which employer claimed the possession of a shop right as one of the defenses. At page 719, the Court says:

> "The cases cited to the effect that an invention must be reduced to actual practice before it is complete as a patentable invention and therefore the work of the defendant in proving that the plaintiff's idea was practical by building full-sized models was essential to the completion of the invention, are all cases involving interference and priority. * * *"

citing cases, including the ones cited by this Court in its opinion.

The Court, after analyzing the case of *Automatic Weighing Machine Co. v. Pneumatic Scale Corp.*, 166

Fed. 288, which was one of the cited cases, goes on to say, at page 720:

> "Where, however, the inventor applies for and obtains a patent on his own draft and application, his invention, if patentable, is considered complete where no interference or prior right is claimed, especially if one skilled in the art can from his draft and description in the application make the device, as it apparently was done in this case, since the defendant made up and sold car seat bases built according to the plaintiff's so-called cardboard and 'cigar box model'."

The judgment of the trial court was affirmed and it was held that the defendant had not acquired a shop right.

In our opinion, the case just referred to is almost on all fours with the case at bar. As we have heretofore demonstrated from the evidence, the invention of the plaintiff was used by defendants in the construction of the accused device utilizing the same identical statement of the invention that Garbell made shortly after his employment began, and which is likewise set forth in the patent itself.

Another factual situation which is the same in the case at bar as the *Heywood* case, *supra,* is that neither employee was engaged in work of the character concerning the invention as ultimately made. Garbell was engaged in preliminary design work for some time after he was first employed by Consolidated and the uncontradicted evidence is that, within a matter of weeks after his employment, he first suggested the use of his invention. (R. 445.)

IV.

FINDINGS SUPPORTED BY EVIDENCE.

Aside from the special findings of the trial court, with which this Court did not agree, there are still general findings of the trial court covering this entire field, such as finding XXXIII:

> "That the defendants have not established the claim of shop right license."

and finding XXXIV:

> "That defendants have not established the defense of an implied, or any, license."

The defense of shop right being an affirmative defense, the full burden of proving that defense was on the appellants, and this they failed to do.

The evidence in this case is almost wholly without conflict, and all of it is in favor of the contentions as advanced by appellees. If the evidence, taken as a whole, is viewed in the light most favorable to appellants, the most that they can possibly claim is a slight conflict in one or two points.

Under such circumstances, an appellate court is bound by the determination and the findings of the trial court. Furthermore, in the case of conflicting testimony, the appellate court must assume a view of the evidence most favorable to the appellee.

> *Wilmington Transportation Co. v. Standard Oil Co.* (C.C.A. 9), 53 Fed. (2d) 787.

V.

CONCLUSION.

We believe that a consideration of the evidence, as pointed out in this petition, will result in this Court concluding that, by reason of the somewhat involved condition of the record, it misconceived the application of some of the testimony, and that, therefore, the contentions made in this petition are based upon a sound foundation.

It is respectfully, but with great confidence, insisted that, for the reasons indicated, a rehearing of this controversy should be granted.

Dated, San Francisco, California,
July 8, 1953.

Theodore Roche, Jr.,
Sullivan, Roche, Johnson & Farraher,
Lyon & Lyon,
Attorneys for Appellees and Petitioners.

Certificate of Counsel.

I hereby certify that I am of counsel for Appellees and Petitioners in the above-entitled cause, and that in my opinion the foregoing petition for rehearing is well founded in point of law, as well as in fact, and that said petition for rehearing is not interposed for delay.

Dated, San Francisco, California,
July 8, 1953.

Theodore Roche, Jr.,
Of Counsel for Appellees and Petitioner.

No. 12900

United States Court of Appeals

For the Ninth Circuit

J. ELROY McCAW & JOHN D. KEATING, *Appellants*,

— vs. —

TORKEL WESTLY, THE TAX COMMISSIONER OF THE TERRITORY OF HAWAII, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

BRIEF OF APPELLANTS

KENNETH DAVIS,
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Attorneys for Appellants.

THE ARGUS PRESS, SEATTLE

FILED

MAR 10 1952

PAUL P. O'BRIEN

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THE ARGUS PRESS, SEATTLE

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United States Court of Appeals

For the Ninth Circuit

J. Elroy McCaw & John D. Keating, *Appellants*, vs. Torkel Westly, The Tax Commissioner of The Territory of Hawaii, *Appellee*.	No. 12900

Appeal from the United States District Court for the District of Hawaii

BRIEF OF APPELLANTS

JURISDICTIONAL STATEMENT

District Court:

The jurisdiction of the District Court was established "on a variety of grounds" (Tr. 467); the subject matter involves an act of Congress (Federal Communications Act, Title 47, U.S.C.A.); and a Federal question was clearly shown under Section 1331, Title 28, U.S.C.A.; diversity of citizenship was established under Section 1332, U.S.C.A. (Tr. 3, 4, 5); the amount in controversy exceeded $3,000.00 (Tr. 6); and an act of Congress regulating commerce is involved under Section 1337, Title 28, U.S.C.A.; and a declaratory judgment is requested under Section 2201, Title 28, U.S.C.A. (Tr. 22, 27).

The District Court found (Tr. 467):

> "I am well satisfied that of the cause stated in the complaint this Federal Court has jurisdiction on a variety of grounds: Federal question, diversity of citizenship plus three thousand dollars, and the declaratory judgment statute. If wishes controlled, if convenience were a factor, if speed were a factor, I would without hesitation say, 'Let's go on with the case, the parties are all here, I am reasonably familiar with it, I like working with you folks, I like the case, it presents interesting problems, let's wade into it.' But we all know that those are not legal considerations."

CIRCUIT COURT:

Final judgment was entered February 5, 1951 (Tr. 159). Notice of appeal was timely entered (Tr. 164). This court has jurisdiction of this appeal from said final decision of the said court by virtue of Section 1294, Title 28, U.S.C.A.

STATEMENT OF THE CASE

Appellant McCaw is a citizen and resident of Centralia, Washington, and Appellant Keating is a citizen and resident of Portland, Oregon. In 1946 appellants obtained a license for a limited term from the Federal Communications Commission (See Complaint, Tr. 3 to 30), to operate a radio station in Honolulu, Territory of Hawaii. The conditions precedent to such a grant are set forth in the Complaint (Tr. 7 to 29), and such conditions precedent are so many and varied (including financial, technical, and character qualifications), and the regulations of the Federal Communications Commission are so sensitive, that the states and territories cannot concern themselves in any way whatsoever with the subject matter of radio broadcasting because of the pre-emption of such subject matter by Congress (Tr. 24). Appellants invested a large sum of money to erect and operate Station KPOA, having 5,000 kilowats power, and are now affiliated with the Mutual Broadcasting System, a national network. A license for a limited period (three years) was granted appellants and unless they operate their station within the rigid controls and regulations as propounded by Congress (Title 47, U.S.C.A.) they will lose their entire investment; notwithstanding this complete pre-emption by Congress of this subject matter, the Territory of Hawaii proceeded to classify radio broadcasting with theatres, opera houses, amusements, dance halls, vaudeville, skating rinks (Tr. 6) and placed a tax thereon of two and one-half per cent of their gross income (Tr. 7). No suit was pending at the time of the institution of this action in

any of the courts or agencies of the Territory between the parties involving the subject matter of this litigation. Decisions of the Supreme Court of the U.S. and of this Circuit had heretofore deterred the Territory from attempting to enforce this illegal tax (Tr. 23, 26) and plaintiffs had made their investment in the light of and depending upon these prior decisions of competent courts that they were engaged in a national uniform system of a most sensitive form of commerce, in which a state or territory could have no part without permission being first had of Congress (Tr. 22, 24, 26). The territory had not sued, as aforesaid, the plaintiffs, and in spite of prior decisions of the Supreme Court of the U.S. and of a Three-Judge Federal Court in this Circuit, the Territory engaged in a running fire of correspondence with appellants threatening to collect the tax in spite of these decisions adverse to their contention. Appellants advised appellee the law was illegal and constituted a burden upon a form of commerce which had been pre-empted by the Congress to the exclusion of any concern over the subject matter by the states and territories. Since no other suit was pending, appellants secured the consent of appellee to withhold any action until appellants sought a declaration under Section 2201, Title 28, U.S.C.A. (Tr. 264). The parties cannot confer jurisdiction on a court, but their subsequent desires cannot take it away, either, *once it attaches*. Therefore, appellants sued the Tax Commissioner as an individual, asking for both injunction and declaratory relief, and did not bring a suit against the Territory as such. As aforesaid, there was no suit pending be-

tween these parties in any Territorial court involving the subject matter of this litigation, so the rules of comity prevailing between Federal Courts and States Courts would not inveigh against federal jurisdiction in this case, nor could the rule of discretionary abstention overrule the plain duty of the trial judge to hear a justiciable controversy. The first suit between these parties was in the U.S. District Court.

Appellants alleged they had no adequate, speedy, and efficient remedy in the Territorial Courts and that they could not recover the penalties which exceeded $3,000.00 under any circumstances in the Territorial Courts, for penalties are expressly not returnable under Hawaiian law, even though the tax might be returned (Tr. 321, 323—see Post). Appellants contended, therefore, that their litigation should not be conducted piecemeal and that jurisdiction attached for the entire controversy and not just for a portion (i.e., for penalties alone). And, in view of the further facts that diversity of citizenship was present, and the Federal Communications Commission rules and regulations were so rigid and sensitive in their control of plaintiff's business (Read Complaint, Tr. 3 to 30), only the Federal Courts had jurisdiction of this action on a Federal right.

The Territory agreed to this suit in the Federal Court:

> "THE COURT: Well, of course, right here, speaking of practical effects, the spirit of the Territory to delay any of its remedies against the taxpayer because the taxpayer had said he wanted it in this Court has already had the practical effect of enjoining or restraining you folks

from collecting your tax. So the very thing that you are complaining about by agreement you have been willing to do.

"MISS LEWIS: No, your Honor, we have not been willing to do it, except for the purpose of allowing this question to be got out of the way. In other words, inevitably, since Mr. Davis was determined to get into federal court, the question was going to come up.

THE COURT: But you could have brought him into the Territorial court faster than he could have gotten into this Court, but you don't because you were willing to let him come into this Court first.

MISS LEWIS: Well, the exact statement made was that we were going to object to this federal equity jurisdiction and that Mr. Davis was told that. In other words, we did not bring our suits first—I'd like to put it this way—these are the facts and I have the correspondence * * *." (Tr. 290)

"THE COURT: By being at least courteous, shall we say, in practical effect the Territory has been restrained by a declaration of intention to come into the Federal Court to ask for relief at the hands of the Federal Government. So that by arrangement of the attorneys the spirit of the Johnson Act has been defeated. Now, I say, I don't place much weight on it, but I just happen to see it as you pass by." (Tr. 292)

"MISS LEWIS: If the Court had previously had this question up, that courtesy would not have been extended, but I do feel that Mr. Davis' point about federal court jurisdiction was bound to be determined, and we simply say a lot of wasted motions will be saved. I think the Court is right,

that it is true that in order to meet Mr. Davis' request we have temporarily withheld our suit. That is true.

THE COURT: In other words, even though in your opinion, Mr. Davis may not have a claim for equitable relief in this Court, nevertheless, would not your defensive position be a lot stronger if you had pending an action against the taxpayer in the Territorial courts?

MISS LEWIS: That is true.

THE COURT: I am afraid that you will have to say 'yes.' You may not want to. I won't make you answer it. But I think it would be stronger if you had —

MISS LEWIS: It would have brought in another section, Section 266. On the other hand, it would have been a situation where an attorney writes another and explains why he wants to do this and that. The information is used and you rush into a suit which perhaps was not going to be filed at that particular time.

THE COURT: Well, I think we are giving the whole situation too much attention, and I repeat I don't think there is anything in that area because it eventually gets back to treading on the agreement of the attorneys, which was made in good faith.

MISS LEWIS: Now, the court in the *Great Lakes versus Huffman* case says —" (Tr. 292-93)

"THE COURT (Tr. 297-298): Well, I was just wondering on that pre-emption business, if there might be a difference where, for example, the issue could be thrashed out in the state or Territorial courts without in any way impairing the use of the franchise or license afforded by the

radio commission, as distinguished from a situation where the action of the state or territory was such that the taxpayer couldn't use effectively the privilege that the federal government had given to him. In other words, translated, this radio station might well be able to (132) continue operating just as effectively as it has in the past while the state litigation involving the validity of the tax is going forward. On the other hand, if the state somehow or other took steps to close the radio station down while it pursued this litigation, might not that later be a different basis for coming into the federal court, and would not then the argument of preemption of the field have greater significance? For there the state would definitely be closing down a privilege that the federal government had afforded, and you would be interfering with interstate commerce."

"THE COURT (Tr. 313): Well, this may not get us anywhere but assuming that it is true that the radio station has only a couple more years to go on its existing license before it applies for a renewal, what I am getting at is, that this Court could get you to the Supreme Court faster than the Territorial court could. And you could collect your tax faster by staying in this Court than you could by going over to the Territorial court where you would have one, two, three, four steps to go through instead of three over here."

THE COURT (Tr. 314): Well, what is going to happen to your tax if, for example, the federal government sees fit for some reason or other not to renew KPOA's license and it goes out of business?"

The District Court ignored the answers to the questions brought up by the Court itself.

There is *no remedy* at all for the recovery of penalties exceeding $3,000.00 in this case. The time for appeal from the assessments had expired (same as in *Hillsborough v. Cromwell*, 66 Sup. Ct. 445).

Section 5535 (Appellants' Exhibit "C" attached to Complaint), Laws of Hawaii, expressly provide:

> "No taxpayer shall be exempt from delinquent penalties by reason of having made an appeal on his assessment, but the tax paid, covered by an appeal duly taken, shall be held in a special deposit and distributed as provided in Section 5219, for which purpose the word '*valuation*' *shall be deemed to refer to the amount of income.*" (Law 1945) (Italics ours)

Section 5219 (Appellants' Exhibit "C"), Laws of Hawaii, states (referred to in above Section 5535):

> "The tax paid upon the amount of any assessment, actually in dispute and in excess of that admitted by the taxpayer, and covered by an appeal duly taken, shall, during the pendency of the appeal, be held by the treasurer in a special deposit to await the final determination of the appeal. If the final determination is in whole or in part in favor of the appealing taxpayer, the treasurer shall repay to him out of such deposit the amount of the tax paid upon the *valuation* held by the court to have been *excessive or nontaxable. The balance*, if any, or the whole of the deposit, in case the decision is wholly in favor of the assessor, *shall, upon the final determination, become a realization under the tax law concerned.*" (Underscoring ours)

The "trick" in the above sections is that "valuation" is described in Section 5535 as *the amount of the income* when it comes to *refunding* in Section 5219, and the penalties, illegally collected (more than $3,000.00), become "a realization under the tax law concerned" (to the Territory). For a deposit preceding litigation, however, "penalties" must be included as part of the "income" (Sec. 5463), so win or lose the law suit, the Territory cannot help but make some money, i.e., from the "penalties" which are not returnable even though the tax is held illegal. These last statutes (5535, 5219, *supra*) repealed all other Hawaiian laws on the subject matter by implication. The statute, Section 1575, mentioned by appellee, which is silent as to "refunds" (Tr. 271), was passed in the year 1907 and must be construed in favor of the later enactments of 1945 (Sections 5535, 5219). The appellee considered these assertions of appellants as merely "hypothetical" (Tr. 456). The District Court knew this and remarked that Sec. 1575 was silent as to "refunds" (Tr. 271), yet ignored the question. Appellee cited instances of protest payments' being made under Sec. 1575, but no mention was made of a refund ever being given under it, or any decision of the Hawaiian Courts that a refund of penalties and interest was now possible under Section 1575, in view of the enactment of Sections 5535 and 5219. The "doubt of remedy" for appellants in the Territorial Courts (sufficient to come within the doctrine of the *Cromwell* case, Post) is therefore still with us as shown by the following subsequent events to the District Court's decision.

The District Court (Tr. 228) toyed with the idea of "retaining jurisdiction" (as was correctly done in the *Spector* case—Post), but abandoned the idea.

Upon dismissal of the Complaint, in spite of a Motion to Dismiss which admitted the truth thereof, and Motions for Summary Judgment filed by both appellants and appellee, which made the issues entirely one's of law (see *National Broadcasting Co. v. F.C.C.* (on Chain Broadcasting Rules) 63 Sup. Ct. 997, 319 U.S. 190 (1943)), the appellants were confronted with a real dilemna.

Pending appeal to this court, the Territory was going to sue. The time for appeal by appellants to local courts from the assessments had expired (this was admitted). Under Federal Communications Commission rules and regulations any judgment against appellants for more than $1,000.00 remaining unpaid for more than ninety days must be reported (Exhibits "B"' and "D," Complaint). "Economic Aspects" (Complaint, Tr. 10) of the Federal Communications Commission's regulations of a radio station are so rigid that automatically thereby, appellants' license is subject to an expensive "hearing" or "inquiry" if the judgment is unpaid. If appellants pay the judgment, however, a recovery of penalties and interest is impossible.

Therefore appellants *had to agree* and appellee agreed that appellants would bring an action under Section 1575 for $7,500.00 or more (sufficient to invest the $5,000.00 appeal minimum from the Hawaiian Supreme Court to this court). It was solemnly agreed by the parties that a general denial would be interposed by

appellee and the issues simplified as to the Constitutional questions. After appellants were thus nicely "trapped" the appellee counter-claimed for the entire amount (stating "nothing was said" about a counter-claim) including *penalties* and *interest*, to which appellants had no defense except to the Constitutional defense on Federal questions which could have been decided as expeditiously in the Federal Court. No defense was or could be interposed to the amount of the assessment, as the time for appeal therein had expired. Appeal is being taken upwards now from this decision of the local court. The "local remedy" so fondly described by appellee is further made quaint by the local practice where the prevailing counsel "writes the decision" of the "court" (?). The local court rendered an oral decision stating expressly and in substance that if appellants were situated in Vancouver, Washington, or El Paso, Texas, or Spokane, Washington, where its eminations would be heard in Oregon, Mexico, and Idaho, respectively, the court would have to decide for appellants. But, the local court went on to say, since appellants were situated 2,500 land miles from the mainland (notwithstanding the appellants derive their license from Title 47, U.S.C.A., where Hawaii is expressly included in the act by Section 301(a)), those stations "on the border" are in interstate commerce, while appellants and apparently "middle of state" stations, so to speak, are not engaged in interstate commerce. In other words, in spite of Congress' pre-emption of radio, in order to effectuate a national and uniform system of control, radio broadcasting is now "half taxed" and "half free" of

taxation, despite its rigid regulation from a national source, including all its "economic aspects." Taxes involve "the economic aspects" of any business. If this decision is followed, new stations will locate "on the Border," hereafter, and defeat the intent of Congress to serve *all* the people of the states and not just those "on the Border."

(An appendix will be set forth in the Reply Brief quoting the "local'" court's oral "decision," which will be enlightening to students of the law, along with the more polished "decision" of the prevailing counsel. This "practice" is still prevailing in Hawaii as part of the so-called 'adequate remedies" afforded appellants. Litigants are entitled to a "competent court."

Quere: Is the "decision" of the prevailing counsel, upon which an appeal must be taken in Hawaii, a "decision" of a competent court?" Further, is such "practice," due process? Is it a judicial hearing or review within Constitutional understanding?)

THE QUESTIONS ON APPEAL

1. Can a Federal Court, jurisdiction admitted by the court itself, shrink from performing its plain judicial duty under the guise of a discretionary power, which power expanded itself beyond the limits of its logic in the light of admitted facts alleged in the Complaint and affidavits?
2. No suit existed between these parties in any Territorial Court. "Discretionary power" can be *implied* only from the fact that the Congress, in the enactment of the Declaratory Act, merely conferred the power to the courts to grant the remedy without prescribing conditions under

which declaratory relief is to be granted. Can mere implication of a 'power" nullify the granting of the enacted remedy where facts, as appellants alleged, were uncontroverted?

3. The court's statement that "convenience is not a factor" and "speed is not a factor" strikes a strange note in American jurisprudence, jurisdiction obtaining as a Federal Court, and with substantial Federal questions on Federal rights to be decided. Therefore, when the Johnson Act expressly makes "speed" and "efficient" remedies in State Court an actual criteria as to whether the Federal Courts shall permit a state court remedy to prevail, can a Federal Court nullify and ignore such language of the Johnson Act, especially in the light of the facts disclosed in the transcript?

SPECIFICATION OF ERRORS

1. The District Court's judgment was contrary to law, for the substantial and uncontroverted allegations of the Complaint, as a matter of law, supported the entry of a declaratory judgment, as well as a temporary injunction.

2. The District Court, after finding it had jurisdiction, had no right to utilize its discretionary powers in order to coerce appellants to foresake and forego federal rights guaranteed by the United States Constitution and the Federal statutory scheme for a complete judicial review of a cause of action rightfully before the court.

3. The District Court's final judgment was calculated to avoid a decision on substantial questions, and

was an abuse of judicial discretion in that, finding jurisdiction obtained 'on a variety of grounds,' the District Court shrank from performing its plain judicial duty by withholding from the appellant a decisive safeguard against legislative excess — the safeguard guaranteed by statute and this court—"Judicial Review."

4. The District Court carefully shifted the statutory scheme for judicial review of legislative excess to this court, where unresolved substantial questions now confront this court virtually as problems of first instance, when as a matter of law the District Court should have completed the case and entered a Declaratory Judgment for the appellants.

5. The practice of withholding so-called discretionary privileges or procedural advantages, as the District Judge did in this cause, because of undisguised expressions and solicitude for non-existent or vagrant remedies within the judicial scheme of a Territorial Sovereign, despite its legislative excesses, over the rights of individuals, expands the principle of "judicial discretion" beyond the limits of its logic, especially where the rights under the policies, and the philosophy behind the Federal Declaratory Judgment Act and the Communications Act are defeated thereby.

6. The court erred in denying appellants' Motion for a Declaratory Judgment, and in refusing to proceed beyond "jurisdictional grounds," the District Court's oracular edict and subsequent judgment demonstrated no discretion against "judicial legislation" in order to avoid a decisive answer to appellants' substantial questions.

7. The court erred in denying appellants' Motion for a Temporary Injunction.

8. The court erred in denying appellants' Motion for Summary Judgment, as there was no genuine issue as to any material facts, and the appellants were entitled to judgment as a matter of law.

9. The District Court erred in failing to grant the relief prayed for in the Complaint and other motions of appellants.

10. The District Court erroneously confined the proceedings to the sole question "of jurisdiction," a matter of law, then when this was shown, promptly by some unique legal alchemy, and without any evidence or further hearing, withheld equitable relief by coercing appellants to embark upon other and unknown legal waters in search of equitable relief, when the confusion over these substantial questions could have been obviated by decisive action of the District Court.

11. Frustration of Congressional policy, as reflected in the Declaratory Judgment Act, has been irrevocably congealed unless the District Court's plain duty of deciding the substantial questions raised by the Complaint is assumed by this court.

12. By admitting jurisdiction existed, the District Court had to recognize the substantial character of appellants' allegations in their Complaint, yet consonant with the District Court's forthright policy of indecision, and its withholding of equitable relief, not only were the benefits of the Declaratory Judgment Act denied appellants, but the District Court has augmented and added to appellants' woes.

13. No Judicial Review was given appellant by the District Court, even though appellants raised many substantial questions, nor were any answers received thereto, which is appellants' due, consistent with the true meaning "Judicial Review" of legislative excesses by a court of competent jurisdiction.

14. The District Court, by its ruling, has denied to appellants their statutory and common law rights to challenge the excesses of a sovereign by denying that the elements of convenience and speed are factors in the settlement of a private citizen's troublesome affairs with an excessive sovereign where jurisdiction as a Federal Court exists, as it ruled. Yet, the District Court, by its action in withholding relief in this case, has coerced appellants into two new courses of expensive, time consuming, prolonged and inconvenient actions, namely, (1) appeal to this court, and (2) a suit simultaneously in the Territorial Courts where such Territorial action will belatedly, if it ever does and while appellants are uncertain it ever will, land in this court. Whereas, by decisive action, this expense and inconvenience could have been disposed of.

15. The District Court erred in failing to declare and hold that the Hawaiian Excise Tax on Radio Broadcasting, as assailed in the Complaint, was illegal and unconstitutional.

16. The District Court erred in failing to hold that the tax on radio broadcasting, as assailed by appellants, levies a burden upon interstate commerce, and that the Territory of Hawaii unlawfully concerned itself with a subject matter pre-empted by Congress

and which is no longer a subject matter upon which states or territories may legislate, because exclusive concern and regulation thereof is vested in Congress and the agencies designated by Congress to so regulate, and in this case, the Federal Communications Commission.

17. The District Court erred in not finding that the said tax as pertains particularly to Radio Broadcasting was in violation of the Hawaiian Organic Act, as well as the Constitution of the United States, and the District Court further erred in failing to enter judgment for the appellants as a matter of law, and in considering speculative remedies existed elsewhere, where the appellants had Federal jurisdiction as a matter of right, without regard to vague and speculative "judicial policies" and a "judicial discretion" which is in conflict with accepted Federal rights of a Federal nature." (Tr. 170-174)

ARGUMENT

(On Specification of Errors 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14.)

> "THE COURT: I am well satisfied that of the cause stated in the complaint this Federal Court has jurisdiction on a variety of grounds: Federal question, diversity of citizenship plus three thousand dollars, and the declaratory judgment statute. If wishes controlled, if convenience were a factor, if speed were a factor, I would without hesitation say, 'Let's go on with the case, the parties are all here, I am reasonably familiar with it, I like working with you folks, I like the case, it presents interesting problems, let's wade into it.' But we all know that those are not legal considerations." (Tr. 467)

Compare the foregoing with Sections 1265 and 1266, Vol. 3, Federal Practice and Procedure, Barron and Holtzoff (Rules Edition).

Section 1265.—Discretion of Court:

> "The granting of a declaratory judgment rests in the sound discretion of the trial court exercised in the public interest. It is always the duty of the court to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief. Some cases have said that where governmental action is involved, courts should not intervene unless the need for relief is clear, not remote or speculative." (Cites cases)
>
> "That it should rest in the court's discretion is implied from the fact that the act merely conferred power to grant the remedy without prescribing conditions under which it is to be grant-

ed (cites cases). This discretion is not absolute. It is a sound judicial discretion reviewable on appeal (cites cases). In exercising its discretion the court should not extend the remedy if to do so would entail a piecemeal litigation of the matters in controversy (cites cases). The court may weigh the inconvenience and burden to litigants living at a distance (cites cases)."

Section 1266. — Existence of another Adequate Remedy:

"Rule 57 specifically provides that the existence of 'another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate' (cites cases). However, even before this rule the courts had applied the same principle (cites cases). A federal action for a declaratory judgment, if otherwise appropriate, should not be dismissed merely on the ground that another remedy is available or because of a pendency of another suit, if issues in the declaratory judgment action will not necessarily be determined in that suit (cites cases). Even if the parties and the subject matter are the same in both actions, pendency of a prior action in another federal district court does not necessarily require dismissal of the declaratory judgment action (cites cases). The pendency of another action in the state courts is not a bar to declaratory relief. The determinative factor is whether the action for that relief will probably result in a just and more expeditious and economical determination of the entire controversy." (cites cases)

"The general rule is that the existence of another adequate remedy does not bar a declaratory judgment." (cites cases)

> "Nevertheless, unnecessary interference with state court litigation should be avoided (cites cases). Ordinarily a federal court will not entertain an action for a declaratory judgment where another proceeding is already pending in the state courts in which all matters in controversy between the parties can be fully adjudicated (cites cases). The court before entertaining an action for a declaratory judgment involving a controversy some aspects of which are the subject of an action in the state courts, must ascertain whether the matter can better be settled in the federal court. To do this it must first ascertain whether all matters can be adjudicated in the pending state courts proceeding; and whether necessary parties have been joined and are amendable to process (cites cases). Or the matter may be resolved by a determination of the question whether there is such plain, adequate and speedy remedy afforded the plaintiff in the pending state court action that a declaratory judgment will serve no useful purpose." (cites cases)

The Johnson Act (Section 1341, U.S.C.A.) does not apply to "Territories" any more than the Three Judge Federal Court Statute (Sections 2281-84, U.S.C.A.). The Supreme Court in *Stainback v. Mo Hock*, 336 U.S. 368, 69 S. Ct. 606, held that the Three Judge Statutes' reference to "states" did not apply to "Territories". This decision was in 1947. The revised Judicial Code was enacted and signed by the President in June, 1948. Therefore, Congress had knowledge of the Supreme Court's views as to the difference between "states" and "territories". That decision was uttered a year before Congress enacted the Code. If Congress had

intended that Section 1341 (Johnson Act) should include the word "Territories", Congress would have so enacted such into law as it did just a few sections before 1341, where in Section 1332 at the same session, Congress inserted subsection B of the Diversity Section, stating:

> (B) "The word 'states 'as used in this Section, includes the Territories and the District of Columbia." (June 25, 1948)

Thus, the erroneous policy of judicial abstention, or discretionary abstention, as applied to this case, is met at the outset with negation by this plain expressed intent of Congress. Congress enacted the Declaratory Remedy. Judicial process is intended to effectuate, not congeal Congressional policy. The Declaratory Act is plain. Under Rule 57, even a right to trial by jury is given by the Declaratory Act, and this implies that the Act was to be more than a mere "discretionary" judicial *grant*. On the contrary, plain reading discloses it to be a valuable *right* to a citizen:

Rule 57. Declaratory Judgments.

> "The procedure for obtaining a declaratory judgment pursuant to Title 28, U.S.C., §2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."

In reason it is difficult to see how this statute and

rule can become so emasculated without omission on the part of the courts. The Declaratory Statute is neither legal nor equitable, but a Civil action (Section 38.29, Moore's Federal Practice (2nd Edition)). Thus, the only way emasculation and confusion can ensue over the application of this *right* is by an abuse of judicial discretion. There is a legal pun to the effect that there is a thin line between judicial "discretion" and "indiscretion". We in the legal profession must derive content, when discretion is abused, with the thought that there is always a right of appeal. So there is, but how many cases are appealed to this court from the number filed in the District Courts? This court can take judicial notice that the appeal in this case will entail costs in excess of $2,000.00 (Printing, $1,000.00; reporter's transcript, $800.00; briefs, $300.00)not counting lawyers' fees . Thus, a litigant is entitled to a complete and full hearing—a searching inquiry into his allegations, and just as much solitude for his *rights* as the court expresses for the *rights* of an excessive sovereign. All of this is supposed to be known by an experienced trial judge. The District Court stated, in substance, "Jurisdiction obtained; the parties are all here—am familiar with the case, etc. * * *" (Tr. 467). No other action was pending. Why wasn't the case decided? Why were appellants coerced into a local forum where *the prevailing lawyers write the decisions of the courts?* (Hawaiian Circuit Court Practice—see *supra.*) Why was the expressed law of Hawaii denying refunds of penalties and interest glossed over?

Why is a Territory or State entitled to be protected

in their wrongdoing by indirect and omissive action of the courts? In *Williamson v. U. S.*, 95 Law Edition 1379 (1383), Mr. Justice Jackson in setting bail for certain Communists refused to countenance a denial of Federal rights by indirection, as the District Court did in this case at bar. The Justice stated:

> "* * * If the Government cannot get at these utterances by direct prosecution, it is hard to see how courts can justifiably reach and stop them by indirection. *I think courts should not utilize their discretionary powers to coerce men to forego conduct as to which the Bill of Rights leaves them free.* Indirect punishment of free press or free spech is as evil as direct punishment of it. Judge Cardozo wisely warned of 'the tendency of a principle to expand itself to the limit of its logic.' If the courts embark upon the practice of granting or withholding discretionary privileges or procedural advantages because of expressions or attitudes of a political nature, it is not difficult to see that within the limits of its logic the precedent could be carried to extremities to suppress or disadvantage political opposition which I am sure the Department itself would deplore." (Italics ours)

The Congress did not intend, ever, to deprive litigants of their lawful claims or defenses by permitting an abstract personal conception of justice by an individual judge or a personal conception of a court's power to be substituted for Federal statutory rights or for rights recognized by rules of substantive law flowing therefrom. Especially is the foregoing true, and it becomes harmful, if rights flowing from Federal statutes or from the Federal statutory scheme for the

administration of justice are deliberately ignored and and displaced by an assumption of a court's power and duty that could lead only to unjustified expense, and to its consequent sequel, disrespect for all law. In other words, if Congress gives a right, can a court admit jursidiction but withhold that right on a mere caprice of its own? If it can, then we do not need Congress.

No judicial scheme for the administration of justice can be premised upon personal emotion, or upon transitory predelictions of an individual judge. If so, there can be no integrity in the law. It is for this reason that the term "judicial discretion" is a limited one, and cannot, ever, overpower statutory rights, or even those uniform and settled rights flowing from *stare decisis*. The public cannot abide by or adhere to law unless the law has uniformity and certainty.

Congress gave the Federal courts power to "declare" rights where issues were confused. It, therefore, becomes a duty for a court to declare rights where jurisdictional requirements are met. This duty is primary and prescribed and cannot be shrugged off by a capricious adaptation of the term "Judicial Discretion," to the end that the phrase, as practiced upon appellants by the District Court of Hawaii, is but legal alchemy whereby there is precipitated a denial of recognized rules of substantive law and Federal rights flowing from a Federal statute to appellants:

AT THE WORST,

> "The discretion of a judge is said to be the law of tyrants. It is always unknown; it is different in different men; it is casual, and depends upon

constitution, temper and passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly, and passion to which human nature is liable. *Optima lex quae minimum reliquit arbitrio judicis; optimus judex qui minimum sibi.* Bac. Aph.; 1 Cas.(Pa.) 80, note; 1 Powell, mortg. 247a; 2 Belt, Supp. to Ves. 391; Toullier, Dr. Civ. liv. 3, note 338, 1 Lilly, Abr. 447."

AT THE MOST, the discretion of a judge consists of:

"The power of a judge, in *certain matters*, to decide in accordance with his own judgment of the *equities* of the cases, unhampered by inflexible rules of law (not statutes, however). The lattitude allowed to judges as to the action to be taken on *certain facts* (not law). See 34 Barb. (N.Y.) 291.

"And many matters relating to the trial, such as the order of giving evidence, granting of new trials, etc., are properly left mainly or entirely to the discretion of the judge.

"As applied to executive officers, it means a power to decide on the propriety of certain actions, without any review by others.

"* * * In Criminal Law. The ability to know and distinguish between good and evil,—between what is lawful and what is unlawful." (Notes and Italics ours)

Cyclopedia of Law, Third Edition.

The function of judicial review is dispassionate and disinterested adjudication, unmixed with any concern as to success of either prosecution or defense. *U. S. v. Morton Salt Co.*, Ill. 1950 70 S. Ct. 357, 338 U.S. 632.

Excessive concern of the courts for "excessive" sovereigns makes the term "comity", when misapplied as

here, a mawkish term in the light of the definition of "judicial review" above. Failure of a court to do its plain duty, and adopting a policy of indecision by the use of the term "judicial discretion" does not constitute "judicial review," to which the most impoverished citizen is entitled. If so, then "judicial discretion" becomes an unknown, surprising and unstudied legal mixture, precipitating passion and caprice as a synthesis for law and statutory rights. If "judicial discretion" can be used to withhold rights flowing from a Federal statute, or to deny "judicial review" of or a "declaration" on substantial and admitted Federal questions in spite of a prescribed duty to do so, then the power of a judge becomes uneasily superior to the legislative branch of the government, when equal balance was constitutionally intended.

The withholding of statutory rights, or refusing to decide admitted substantive federal questions under the guise of "judicial discretion," even with the best of intentions, is dangerous and leads but to coercion. It is better to decide the issue, jurisdiction admittedly obtaining, or even if doubt prevailed, than the adaptation of a policy of indecision, erroneously based upon a misapplication of a statute or rule of law (Johnson Act and its philosophy). By refusing to adhere to the plain prescribed new remedy as afforded by the Declaratory Act, jurisdiction as a Federal court existing as the court admitted, and refusing to function as a court to judicially review excessive acts of a sovereign simply because of an unsound and unwisely conjured policy of "abstention" because a sovereign is involved, a court thereby sloughs off its robes of ju-

dicial office and must perforce view in doubtful tranquility its new and uncommon roll as a "legislator" by indirection.

Resolute and adamant to the end, and ostensibly proud of this new found "power"—"judicial discretion"—and in order to avoid a decision and thereby irrevocably congealing the rights given to appellants by Congress under the Declaratory Judgment Act, this District Court not only completed its abdication as a court, and subconsciously became a "legislator", but in doing so, it unwittingly frustrated the statutory scheme for judicial review by shifting to this court the District Court's primary and prescribed responsibility for a judicial review of the acts complained of in Appellants' Complaint.

Judicial "legislation" was indulged and utilized with undisguised frankness for the solicitude of an excessive territorial sovereign to the detriment of citizens of the United States—the appellants. In addition, the District Court's utter abstemiousness as to any thought or care about adding to appellant's woes, through its policy of indecision, is embarrassing to thoughtful students of the law. The principle of "judicial discretion" was expanded beyond the limit of its logic in this case and a defeat of Congressional philosophy and policy, as expressed in the Declaratory Judgment Act, resulted. A policy of solicitude to an excessive sovereign, conveyed through a forthright policy of indecision, cannot be fitted into any category of equitable jurisprudence. There is nothing equitable about it.

Appellants were thus compelled to forego their rights in a District Court of the United States in spite of decisions of the Supreme Court of the United States in *Fishers Blend v. State of Washington*, 297 U.S. 650, holding radio, as such, could not be taxed by a state. This ruling was reaffirmed and reiterated in *Western Livestock v. Bureau of Revenue*, 58 Sup. Court Rep. 546, wherein the court stated "if broadcasting could be taxed, so also could reception," and thus brought Radio Broadcasting into those enterprises where a state tax would be an illegal multiple burden (see *Freeman v. Hewit*, 329 U.S. 249, and *Carter v. Weekes*, 330 U.S. 422).

"Comity" had nothing to do with this case. There was no "state" involved. There was no "pending" action or actions in the Territorial Court. "Discretion" was misapplied for its application aided an alleged wrongdoer—an excessive soverign—who, at this stage of the proceedings, admitted its excessiveness by its motion to dismiss. Yet in effect, and by this decision, a wrongdoer, as long as it is a "sovereign" of a sort —even less than a state—can challenge and overwhelm a citizen of his rights to a judicial review. This decision impinges public policy and will, if followed, lead to an unjustified smirtch on the reputation of the Federal Judiciary.

It was timely for a declaration of appellants' rights by a Federal Court. Two states, Arkansas and New Mexico (in *Beard v. Vinsonhaler* (1949) 221 S.W. (2d) 3, and *Albuquerque Broadcasting v. Revenue* (1950) 215 P.(2d) 819) had ruled diametrically opposite to the *Fishers Blend* case (*supra*) and ignored

the Supreme Court's augmentation of its prior holding in the *Western Livestock* case (*supra*). Confusion prevailed as to appellants' rights. Appellants were entitled to a Federal Court ruling on Federal questions, since appeals were denied by the Supreme Court from these state decisions, and since the territory took the position these denials of appeal overturned the *Fishers* case (*supra*). The New Mexico case falls of its own weight as its predicate was wrong:

> "As we understand, it is not held in the *Fishers Blend* case that *all* broadcasting is interstate commerce." (Italics ours)

Justice Stone in the *Fishers Blend* case expressly stated:

> "The essential purpose and indispensable effect of *all* broadcasting (not just 250 watts' or 5,000 watts' power, but *all* broadcasting) is the transmission of intelligence from the broadcasting station to distant listeners." (Note and Italics ours)

The Complaint in this case was comprehensive. The Motion to Dismiss admitted its truth. It was alleged that the penalties of this tax could not be recovered under Hawaiian law (Tr. 321). Sections 5463, 5469, 5473, 5535, 5219, Hawaiian laws, all repealed by implication appellees' so-called "remedy" Section 1575 (which was enacted in 1907) and there is no provision for repayment of over $3000.00 in interest and penalties today. There is, therefore, a legal dispute now as to whether there *is a remedy at all* to recover penalties and interest in case the law is held invalid. This alone justified the application of the Declaratory Act in appellants' behalf.

The case of *Hillsborough v. Cromwell*, 66 Sup. Court 445, 326 U.S. 620, is extremely apt to this case. The complaint of appellants alleged that the time for appeal had expired. Appellee does not deny that. In fact appellee belatedly promised to "sue" appellants to "create" an "adequate" remedy "after the fact," so to speak, if the District Court would dismiss this case. The District Court, after the danger of the non-recovery of penalties was pointed out, suggested appellants could become "defendants" (Tr. 232), in some manner believing such rearrangement of the parties could make up for the inadequacy of the Hawaiian remedies for the recovery of penalties and interest.

In *Hillsborough v. Cromwell*, 66 Sup. Ct. 445, 326 U.S. 620, the taxpayer's opportunity to appeal to a New Jersey Board of Tax Appeals had expired before the Federal District Court ruled on a motion to dismiss the taxpayers' action for a declaratory judgment that the assessments were void. It was not clear, as in the case at bar on the penalties, that the taxpayer had open any adequate remedy for challenging the assessment on local grounds and it was held that the Federal Court was not required to hold the case until a determination of local law was made by the state courts. A remedy at law cannot be considered as adequate so as to prevent equitable relief, unless it covers the entire case made by the bill in equity. In the case at bar, we do not challenge just the penalties, but the entire tax.

Even though the New Jersey remedy on the local law question was available to the taxpayer, who claimed to have been singled out for discriminating tax-

ation, an uncertainty surrounded the New Jersey remedy to protect the taxpayer's federal right, as here at bar, and a refusal of the Federal Court to dismiss a bill for a declaratory judgment that the assessments were void, was held to be a proper exercise of discretion by the Supreme Court and the Federal District Court was held to have properly proceeded to decide the case on the merits.

The uncertainty surrounding the New Jersey remedy to protect the taxpayer's federal rights justified the Federal District Court in proceeding to decide the merits of a taxpayer's bill for declaratory judgment that the New Jersey assessments were void. The Supreme Court held that the fact the court placed its decision on local grounds was not objectionable. Here at bar, appellants claim over $3000.00 in penalties will be unlawfully "taken" by Hawaii plus interest. The Hawaiian statutes say "they will become a realization" (*supra*). There is not even any uncertainty about that. Anent mere "uncertainty," the Supreme Court said:

> "In the present cases, it appears that respondent's opportunity to appeal to the State Board of Tax Appeals had expired even before the District Court ruled on the motion to dismiss and it is not clear that today respondent has open any adequate remedy in the New Jersey courts for challenging the assessments on local law grounds.
>
> "It follows that the bill should not have been dismissed. As stated in *Greene v. Louiseville*, 244 .S. 499, 520, 37 S. Ct. 673, 682, 'a remedy at law cannot be considered adequate so as to prevent equitable relief, unless it covers the entire case made by the bill of equity.'

"Though the availability of a state remedy on the local law question be assumed to exist, so much uncertainty surrounds the New Jersey remedy to protect the taxpayer's federal right that a refusal to dismiss the bill was a proper exercise of discretion. Thus, however, the case may be viewed, the exceptional circumstances which we have noted take it out of the general rule in *Great Lakes Dredge & Dock Co. v .Huffman* (319 U.S. 293, 63 S. Ct. 1070, 87 L. ed. 140). The district court therefore properly proceeded to decide the case on its merits. That it placed its decision on local law grounds is not objectionable. For it is well settled that where the Federal Court has jurisdiction it may pass on the whole case. * * *"

The Supreme Court held also in *Brown v. Western Railway*, 70 Sup. Ct. 105, that a federal right cannot be defeated by forms of local practice and the Supreme Court held it could not accept as final a state court's interpretation of allegations in a complaint asserting a federal right. Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws.

Appellants refer to the *Stainback* case, 336 U.S. 368, 69 Sup. Ct. 606 (*supra*). That case did not turn on the simple question of "protecting" the appellate court's "convenience" and we quote the court as follows:

"* * * While, of course, great respect is to be paid to the enactments of a territorial legislature by all courts as it is to the adjudications of territorial courts, the *predominant* reason for the enactment of Judicial Code Section 266 does not exist as respects territories. This reason was a

> Congressional purpose to avoid unnecessary interference with the laws of a sovereign state. In our dual system of Government, *the position of the state as sovereign over matters not ruled by the Constitution requires a deference to state legislative action beyond that required for the laws of a territory.* A territory is subject to Congressional regulation." (Italics ours)

The foregoing decision does not in any way detract from the powers and duties of a Federal Court in Hawaii as compared with the constitutional Federal Courts on the mainland. Congress simply did not write the word "Territories" either into the Three-Judge Court Act or into Section 1341, the Johnson Act. The courts cannot "legislate" those words into Congressional enactments. The Congress has to do that.

Not only had the time expired for any local remedy, even if the Johnson Act did apply, prior to appellants going into the District Court but the penalties of ten per cent of the Nineteen Thousand Dollars involved herein, plus a two-thirds per cent interest per month are in excess of Three Thousand Dollars. There is no provision in the Hawaii law for the recovery of these penalties in case the law were held invalid even if the money were paid into a local account as insisted by appellee. This is an unconstitutional "taking". If the law were held invalid, under appellee's argument, the "income" paid could be recoverable, but the penalties exceeding Three Thousand Dollars would be confiscated in violation of plaintiffs' constitutional rights. No provision exists for their return even if extracted by an illegal tax. In fact, Sections 5535 and 5219 remove any "uncertainty" and say they shall be "re-

alizations" or mere "prizes," as you will, of the Territory. No appeal could be taken through the local courts for the recovery of these penalties in excess of Three Thousand Dollars nor could any court action be appealed to the United States Circuit Court of Appeals on an appeal from a local court because the sum of penalties is less than Five Thousand Dollars.

There were no elements or issues of criminal law in this case where equity could not interfere. Then, too, the Declaratory Act is more than an equitable action (See Moore, *supra*). A right of trial by jury given by the Act, and Rule 57, gives the Act a Congressional dignity not heretofore allowed by some courts which mere "judicial discretion" has no right to obliterate.

The late case of *Georgia Railroad and Banking v. Redwine*, 96 Law Edition, 255 (advance sheets) holds that an adequate state remedy existing as to only a portion of state taxes, the assessment and collection of which is sought to be enjoined in a Federal District Court, does not dispossess the Federal Court of jurisdiction over *the entire controversy.* Here, the inadequacy of a remedy for the return of the penalties exceeding $3,000.00 is in question. That alone afforded Federal jurisdiction, as the appellants are entitled to have their case tried other than by piecemeal. The *Georgia Banking* case, *supra*, cited the following note:

> "An adequate remedy as to only a portion of the taxes in controversy does not deprive the Federal Court of jurisdiction over the entire controversy." *Greene v. Louisville Rd.*, 244 U.S. 499; *Hillsborough v. Cromwell, supra.*

In *Alabama Public Service v. Southern Railway*, 341 U.S. 341, 95 Law Ed. 1002, the Supreme Court said:

> "We also put to one side those cases in which the constitutionality of a state statute itself is drawn into question (as at bar). For in this case, appellee attacks a state administratrive *order* issued under a valid *regulation* statute designed to assure the provision of adequate *intra state* service by utilities operating within Alabama." (Italics and notes ours)

Radio is not intrastate (*Fisher's Blend* case, *supra*) —nor a utility (Title 47, U.S.C.A.); and the court in the Alabama case (*supra*) while holding the Johnson Act was not applicable, yet indicated indirectly that the Federal judiciary are not, as yet, completely derived of power to aid citizens.

> "A Federal Court of Equity should stay its hand in the public interest when it *reasonably* appears that *private interests will not suffer*." (Italics ours)

The Territory has more money and lawyers than appellants. Appellants are suffering. Appellants have suffered an unusual expense herein where "speed" was held not to be a 'factor;" and "convenience" not a "factor," in spite of the fact that "the parties are all here" (See Tr. 467).

In *Spector Motors*, 340 U.S. 602, 95 L. Ed. 573, the Supreme Court held that a Federal District Court had jurisdiction to entertain an action to enjoin the collection of state taxes alleged to have been imposed in violation of the Federal Constitution when the adequacy of a remedy in the state courts was uncertain;

and that such jurisdiction is not lost by virtue of a later clarification of the proceedure in the state courts. This case will be explored in the later part of this brief.

In *Meredith v. Winter Haven*, 64 S. Ct. 7 (11), the Supreme Court stated:

> "The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, eral rather than in the state courts. In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non-exercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment (cites cases). When such exceptional circumstances are not present, denial of that opportunity by the federal courts merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act * * *.
>
> "But none of these considerations, nor any similar one, is present here. Congress having adopted the policy of opening the federal courts to suitors in all diversity cases involving the jurisdictional amount, we can discern in its action no recognition of a policy which would exclude cases from the jurisdiction merely because they involve state law or because the law is uncertain or difficult to determine. The decision of this

case is concerned solely with the extent of the liability of the city on its Refunding Bonds. Decision here does not require the federal court to determine or shape state policy governing administrative agencies. It entails no interference with such agencies or with the state courts. No litigation is pending in the state courts in which the questions here presented could be decided. We are pointed to no public policy or interest which would be served by withholding from petitioners the benefit of the jurisdiction which Congress has created with the purpose that it should be availed of and exercised subject only to such limitations as traditionally justify courts in declining to exercise the jurisdiction which they possess. To remit the parties to the state courts is to delay further the disposition of the litigation which has been pending for more than two years and which is now ready for decision. It is to penalize petitioners for resorting to a jurisdiction which they were entitled to invoke, in the absence of any special circumstances which would warrant a refusal to exercise it."

"*Erie R. Co. v. Tompkins, supra,* did not free the federal courts from the duty of deciding questions of state law in diversity cases. Instead it placed on them a greater responsibility for determining and applying state laws in all cases within their jurisdiction in which federal law does not govern. Accepting this responsibility, as was its duty, this court has not hesitated to decide questions of state law when necessary for the disposition of a case brought to it for decision, although the highest court of the state had not answered them, the answers were difficult, and the character of the answers which the highest

state courts might ultimately give remained uncertain (cites cases). Even though our decisions could not finally settle the questions of state law involved, they did adjudicate the rights of the parties with the aid of such light as was afforded by the materials for decision at hand, and in accordance with the applicable principles for determining state law. In this case, as in those, it being within the jurisdiction conferred on the federal courts by Congress, we think the plaintiffs, petitioners here, were entitled to have such an adjudication."

Argument on Specifications of Error Nos. 15, 16 and 17

There is occasion, because of the public interest, which transcends private or state interests, no matter how irritating the loss of revenue to either that the case may decide, for proceeding thoughtfully, deliberately and fairly, to the end that the public interest will be served. Radio regulation and the law pertaining thereto must be based on a recognition of sound engineering, as well as legal, principles. Radio and television have had a comparatively short life and they are a new science and art. Only a uniform and scientific system of national control, and of the most sensitive kind, will make it available to all the people as was the intention of Congress when it pre-empted the ether as early as 1927 by the Radio Act, re-enacted in 1934 and amended in 1946 (Title 47, U.S.C.A.). Transmission of intelligence by radio is the most unique and sensitive of all forms of interstate commerce. No more sensitive form of commerce is known to mankind. The public interest required Congress to administer and conserve the ether for the maximum

benefit of all the people of the United States and its possessions. Since the first Radio Act of 1927, as now amended, the Congress had to contend with local interests, state legislatures and lesser bodies, who sought to frame laws imposing a measure of control on radio transmission, its reception, and on the use of the apparatus by which transmission was brought about. Of all those local measures, only three were legitimate and useful and within the scope of the police power.

No effort will be made herein to point out all of those held to be void because of interference with the authority of Congress. Since radio communication was such a sensitive form of interstate commerce that it could only admit of, and required, a uniform system of control throughout the nation, if not throughout the world, this uniform control was vested exclusively in Congress and in its agencies to the exclusion of the so-called police power of the states. Only three of the local measures, however, were legitimate as aforesaid, but all the rest of them unconsciously ignored well established legal and engineering principles and practices that a systematic national control required.

To aid the court in its research for a correct pronouncement of law in this case, the writers hereof will point out some of the mistakes, both of policy and of law in the state measures which resulted in Congress taking full control of the subject matter.

Congress preempted the "financial" aspects of a radio station's existence by affirmatively writing the word "financial" in the statute. The Federal control on the subject was so complete that even had Con-

gress not used the word "financial," the mere silence of Congress on the subject would have amounted to a prohibition of a state to have considered the "economic" aspects of a station at all. However, Congress affirmatively used the word "financial" and the Federal Communications Commission concerns itself with the "economic" aspects of a station, under the Act of Congress. State taxes affect the "economic" aspects of a station; therefore a state must give way to a superior Federal control on the subject matter.

The reasons for this complete national control, and the wisdom of Congress in taking such can be readily demonstrated to mistaken state taxing authorities when a short history of the chaos prevailing before Congress did so is set forth, as we do:

History of National and Attempted State and Municipal Regulation of Radio

The more rapid progress of scientific achievement than of legal control is nowhere better illustrated than in the history of radio legislation. An act to regulate Radio Communication was first passed August 13, 1912 (37 Stat. 302), and such law was in effect until 1927. It was drawn with a view, among others, to encourage the development of the radio-telephone art, as it was then called. No one then contemplated the magnitude of that development into our modern day broadcasting and television. The licensing of radio transmission was placed with the Secretary of Commerce. It was first held in *Hoover v. Intercity Radio Company* (286 Fed. 1003; 1923) by the Court of Appeals of the District Columbia that the granting of a

station license was a purely ministerial act and that mandamus would lie to compel the issuance of a license. Later, on July 8, 1926, the Attorney General of the United States held that the Act of 1912 was a "direct legislative regulation of the use of wave lengths" and that the Secretary of Commerce had no authority to limit the time during which stations might operate, the amount of power they might use or to specify the frequency band which they might occupy (35 Op. 126). These rulings resulted in chaos. Everybody was on the "air" and no one could hear "anyone". There was nothing but "whistling" and "chatter", and interrupted "chatter" at that.

The foregoing illustrates the so-called breakdown of the law on radio. The great number of broadcasting stations, their conflicting desires, and the selfishness of many of them, all coupled with the inability of the Secretary of Commerce to refuse licenses or to restrict their utilization brought about an intolerable condition of chaos and interference in the broadcast portion of the spectrum.

Legislation had been theretofor requested, but this dramatic breakdown of the law caused Congress to pass the Act for the Regulation of Radio Communications of 1927, and Congress created a Federal Radio Commission to enforce that Act. It was fairly obvious even after that Act was passed, because of new achievements, new and unheard of developments, and because of physical and scientific factors, that the Act of 1927 was not the ultimate answer to this new form of science. Immediate demands for new legislation became evident through popular demand. And this demand

for new legislation primarily came into being and broke out through its most accessible outlet—municipal and state legislative bodies. This attempted state and municipal control, while in a large measure springing from a sincere desire to improve reception conditions, began to broaden itself in scope and turn into innumerable forms, until Congress, in 1934, took complete control.

The earliest municipal legislation was enacted as long ago as January, 1923, by the City of Acheson, Kansas, where that city provided penalties for anyone "unnecessarily and electrically disturbing the atmosphere within the limits of this city." Minot, North Dakota, in 1925, decided to impose certain quiet hours upon its citizens and inhabitants; in October, 1926, Wilmore, Kentucky, imposed an annual license tax of One Hundred Dollars ($100.00) upon "all owners or operators of each broadcasting or radiocasting station operated within the limits of this city"; Minneapolis, Minnesota, in February, 1927, imposed a tax similar to that of Wilmore, Kentucky, and went farther in attempting to prescribe the location of stations. Besides attempting to prescribe local license or privilege taxes, and limiting the hours of reception appartus, and restricting the hours of transmission (all of which were subsequently held illegal or swept away by the preemption of Congress), some of the municipalities lawfully dealt with the (1) location of transmission equipment by making zoning laws applicable to radio towers and buildings; (2) control of loudspeaker operation; and (3) laws dealing with apparatus construction relating to fire hazards. The law relating to loud-

speaker equipment does not concern itself actually with transmission, but lawfully abates a noisome nuisance. A reasonable zoning regulation to prevent the erection of unsightly towers and buildings in a residential or restricted neighborhood is considered legitimate. While there are no known cases on this particular point, if a local Board were to arbitrarily "zone" a community from having broadcast facilities, the power of Congress would prevail over a local ordinance for the Commission must prescribe the location of a station. Laws dealing with the apparatus construction are no longer obtaining in radio, because of the Federal Communications Commission's supervision over any and all hazards. The Commission has recognized that poorly constructed towers may collapse and that poorly constructed or unprotected wire lines would result in electrocutions and fire hazards. Local ordinances are now no longer self-controlling, although comity prevails.

The development of this uniform system of control of radio communication by the Congress was accompanied by long and expensive quarrels over the power of the Government to regulate such communications. Thousands of state and municipal ordinances had been enacted only to be found invalid, unwise, and were swept away by the Communications Act. Radio communication, which must be and is the natural parent of television and frequency modulation, must be held to have traversed this handicapped route by the Acts of Congress in assuming control of the subject matter. Congress had foresight. In 1934 (Title 47, Section 153) it defined communications as including "pictures." Vi-

tal elements in the national and international development of radio and television cannot be handicapped by any other than a national and uniform system of control.

Many states and municipalities attempted to tax receiving sets and the Federal Courts uniformly held that Congress, by its preemption of the ether, forbade any tax on receiving sets.

So it is with Broadcasting and Television. Congress only can tax broadcasting, yet it has refrained from doing so because Frequency Modulation and Television Broadcasting are now in the offing. The slightest tax by a state becomes a "financial" and "economic" burden and retards the art in its infancy. It is the revenue from Radio that can only bring Television into being. When Congress considers the field of radio ready for a tax, only Congress can do so, as on receiving sets.

Further, from the history of radio legislation, and decisions of the courts, it is believed that if states must tax the radio field, the states must first obtain a concurrent right from Congress, and not obtain that right from the courts. A tax is a burden on commerce. A burden is a legislative determination. The court has no desire or right to legislate by indirection or directly. Nor has an inferior legislative body the right to create a burden on a field that Congress has already assumed within its power. As a matter of law, and presently so, such a tax is illegal.

As aforesaid, most of the municipal and state measures were held invalid, abandoned, or repealed because of their invalidity. Radio stations were held uniform-

ly by the Federal Courts to be exclusively engaged in interstate and foreign commerce; license fees imposed by municipalities and states were uniformly invalidated. See *Whitehurst v. Grimes*, 21 F.(2d) 787 (D.C.E.D. Ky. 1927); *Station WBT v. Poulnot*, 46 F. (2d) 671 (D.C.E.D. S.C. 1931); *Tampa Times v. Burnett*, 45 F.Supp. 166 (D.C. S.D. Fla. 1942), and *Atlanta v. Atlanta Journal Co.*, 198 S.E. 788.

A gross receipts tax imposed upon the "business" of radio broadcasting was declared invalid by a Three-Judge Federal Court, Ninth Circuit, in *KVL v. State Tax Commissioner* (State of Washington) 12 F.Supp. 497; and a gross receipts tax was declared invalid by the Supreme Court of the United States in *Fisher's Blend Station v. Tax Commission*, 297 U.S. 650.

However, mere dictum by the Supreme Court, and kindly latitude of that court in discussing a badly pleaded case before it, in the *Fisher's Blend* case, has led to a grossly inaccurate interpretation of that court's decision. It is thus that we are today confronted in this case as to just what the correct ruling should be on a gross receipts tax on the "business" of radio broadcasting, although a careful reading of the *Fisher's Blend* case and the *KVI* case shows that any contention for a gross receipts tax by a state or territory is contrary to the intent of Congress, and Federal Court decisions.

Subsequently, advantage was taken by legislative bodies of the last paragraph of the Supreme Court's decision in the *Fisher's Blend* case, wherein the court, after fully answering and negatively disposing of argument not even advanced in the pleadings, concluded:

> "Whether the state could tax the generation of such energy (referring to only the preceding paragraph's discussion of the *Utah Power* case, which was held inapplicable to radio, and which case involved a power company's generation of energy as distinct from its transmission of such current into other states by land lines) or other local activity of appellant, as distinguished from the gross income derived from its business, it is unnecessary to decide." (Note ours)

Thus a vague and unintended "possibility" was seized upon by taxing bodies that needed revenue by unintentionally distorting this last paragraph of the court's opinion. It was considered that the Supreme Court left open the possibility that some of the income might be allocable to intrastate commerce. Scant attention has been paid to the entire opinion. *Radio does not generate energy.* It buys power and converts that power into electro-magnetic waves. It was not alleged in the *Fisher's Blend* case, as here in the case at bar (Tr. 24) that there is no such thing as "intrastate" commerce in radio; that such a term (intrastate) is a misnomer. In fact, the Supreme Court had to take judicial notice of many facts in the scant record it had before it in order to make a decision. But that decision was sufficient, as will be shown later herein.

The *Fisher's Blend* case involved a Washington State Tax of 1935 and was decided in the year 1936. The *KVL* case (Three-Judge Court at Tacoma, Washington) involved a 1934 Washington State Tax (decided 1935 and not appealed) and there was no room for doubt as to the sufficiency of the allegations in the *KVL* case. It was argued there, as now, that Congress

had foreclosed the subject matter to the states. Justice Stone, in the *Fisher* case, said, "all" radio was commerce, not stations of either "high" or "low" power, but *all.* The State of Washington, in the *KVL* case, could not, as a matter of fact or law, traverse the pleadings in such a case. As a matter of law, the Territory of Hawaii cannot do so in this case (See "Chain Broadcasting Rules decision," *National Broadcasting Company v. Federal Communications Commission* (1943) 63 S. Ct. 997, 319 U.S. 90.

Continuing with the history, as herein briefly outlined, the Federal Communications Commission in March, 1946, issued its "Blue Book" wherein the Federal Communications Commission declared its jurisdiction over the 'Economic Aspects" of a broadcast licensee. "Economic Aspects" include "financial" (Act of Congress includes the word "financial") aspects also (See Complaint, Tr. 10). The Supreme Court held in 1940 that "financial qualifications to operate the proposed station" was an important element of "public interest requirements." See *F.C.C. v. Sanders Bros.*, 60 S. Ct. 693, 309 U.S. 470. Also, economic injury, in *Colorado Radio v. F.C.C.* (1941) 118 F.(2d) 24 (the Court of Appeals did not state *of what degree* and Congress only has this right) to a radio broadcasting station licensee was held relevant on the issue of public interest as to whether a license should be granted. To the same effect, see *Heitmeyer v. F.C.C.* (1938) 95 F.(2d) 91; *Stuart v. F.C.C.* (1939) 105 F.(2d) 788. See *Saginaw Broadcasting v. F.C.C.* (1938) 96 F.(2d) 554 (Cert. denied, 59 S. Ct. 72) where it was held to be a duty of the F.C.C. to make

a finding of adequate financial support as a basis of granting a license.

However, in spite of the foregoing assumption of control by the Federal Communications Commission of the "Economic Aspects" of Radio licensees; and in spite of laws and decisions of the Federal Courts (*supra* and *post*), Arkansas and New Mexico in *Beard v. Vinsonhaler* (1949) 221 S.W.(2d) 3, and *Albuquerque Broadcasting Co. v. Revenue* (1950) 215 P.(2d) 819, decided flat license fees were valid. Attempt was made in New Mexico to appeal to a Three-Judge Federal Court, but the Federal Court, while holding radio was interstate commerce, was thwarted by complainants prior action of submitting to state jurisdiction and the Johnson Act (Section 1341, U. S.C.A.) from granting relief.

Mere denials by the Supreme Court of appeals from these decisions are now erroneously considered by taxing bodies as overruling the *Fisher's Blend* and the *KVL cases* (*supra*) in spite of the Supreme Court's statement in 70 S. Ct. 252, that

> "a denial of certiorari means only that fewer than four members of the Supreme Court thought that certiorari should be granted and carries no implication on the merits."

The Johnson Act (Section 1341, U.S.C.A.) which is inapplicable here, has prevented the Supreme Court from getting the proper vehicle upon which to clearly state the law and bring the *Fisher's* case up

to the consistency with which the Federal Communications Commission acts, and the Congress intended it to act. If the courts have doubt that a uniform national system of control over radio, precluding any state control whatsoever on the subject matter at all, is not the intention of Congress, then such a declaration should be made forthrightly. No tax should ever be allowed to be collected under the guise of innuendo, indirection, confusion, or misinterpretation. Such tactics only lead to legal indignity and from the foregoing historical resume, television, the new-comer, so to speak, will be longer in coming out unless these "economic aspects" are cleared up (See *Dumont v. Carroll*, 184 F.(2d) 153—Post). For, if the states can tax at all, the present tax of two and one-half per cent can be raised to ten per cent and thus will be accomplished the second "breakdown" in communications, which Congress intended should never happen again in 1934.

Radio Communications Are All Interstate Commerce Regardless of Whether They Are Intended for Reception Beyond the State and Regardless of Any Question of Profit.

In *Whitehurst v. Grimes* (21 F.(2d) 787), the court held:

> "Radio communications are all interstate. This is so, though they may be intended only for intrastate transmission; and interstate transmission may be seriously affected by communications

intended only for intrastate transmission. Such communications admit of and require a uniform system of regulation and control throughout the United States, and Congress has covered the field by appropriate legislation."

In *United States v. American Bond and Mortgage Co., et al.* (D.C., N.D., E.D., Ill., 1929) 31 F.(2d) 448, Judge Wilkerson, in a very able opinion, said:

> "It does not seem to be open to question that radio transmission and reception among the states are interstate commerce. To be sure, it is a new species of commerce. Nothing visible or tangible is transported. There is not even a wire over which 'ideas, wishes, orders, and intelligence' are carried. A device in one state produces energy which reaches every part, however small, of the space affected by its power. Other devices in that space respond to the energy thus transmitted. The joint action of the transmitter owned by one person and the receiver owned by another is essential to the results, but that result is the transmission of intelligence, ideas, and entertainment. It is intercourse and that intercourse is commerce. (*Gibbons v. Ogden*, 9 Wheat. 1, 68; *Pensacola Telegraph Co.*, 96 U.S. 1, 9; *Western Union Telegraph Co. v. Pendleton*, 122 U.S. 347, 357; *International Text Book Co. v. Pigg*, 217 U.S. 91, 106, 107.)"

(See also 24 Op. 100, 101; *Marconi Wireless Telegraph Company of America v. Commonwealth*, 218 Mass. 558; Minnesota Rate Case, 230 U.S. 352; *American Express Co. v. United States*, 212 U.S. 522.)

Since Radio Communication Is Interstate Commerce and It Admits of and Requires a Uniform System of Control Throughout the Nation, If Not Throughout the Entire World, This Control Is Vested Exclusively in Congress and Its Agencies to the Exclusion of the So-Called Police Power of the States.

That radio requires uniform national and international control is apparent from even a passing consideration of the art. "Radio waves know no frontiers." They have been the subject of repeated international conferences dating from 1906. A 5-kilowatt broadcasting installation anywhere in the United States or its Territories has an interference range extending beyond the borders of the country. In the frequencies above 6,000 kilocycles, transmission using less power than that of a small electric-light bulb is heard around the world. Allocation of frequency and power to stations must produce severe interference unless they are made part of a generally interrelated allocation of national scope. Where power or frequency gives a station international effect, its assignment is registered with the International Telecommunications Union at Berne (appellants frequency is registered in Switzerland—Tr. 17).

In the case of the *State Freight Tax* (15 Wall. 232, 21 L. Ed. 146) the court said:

> "* * * the rule has been asserted with great clearness, that whenever the subjects over which a power to regulate commerce is asserted are in their nature national, or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclu-

sive legislation by Congress." (Citing number of cases)

(See also *Henderson, et al. v. Mayor of New York, et al.*, 92 U.S. 259, 23 L. Ed. 543.)

In *Walling v. Michigan* (116 U.S. 446, 29 L. Ed. 691) Mr. Justice Bradley, speaking for the court, at page 455, said:

> "We have so often held that the power given to Congress to regulate commerce with foreign nations, among the several states, and with the Indian tribes is exclusive in all matters which require, or only admit of, general and uniform rules, and especially as regards any impediment or restriction upon such commerce, that we deem it necessary only to refer to our previous decisions on the subject, the most important of which are collected in *Brown v. Houston* (114 U.S. 622, 631) and need not be cited here. We have also repeatedly held that *so long as Congress does not pass any law to regulate such commerce among the several states, it thereby indicates its will that such commerce shall be free and untrammelled; and that any regulation of the subject by the states, except in matters of local concern only is repugnant to such freedom.*" (*Welton v. Missouri*, 91 U.S. 275, 282; *County of Mobile v. Kimball*, 102 U.S. 691, 697; *Brown v. Houston*, 114 U.S. 622, 631) (Emphasis ours)

There are numerous decisions of the Supreme Court holding that when the thing to be regulated admits of a uniform nation-wide system of regulation, and has been declared to be, and is, interstate commerce, and Congress enacts a law to regulate it under the commerce clause of the Federal Constitution, that

the states have no authority to enact laws which would interfere with Federal regulation. In the case of *United States v. American Bond and Mortgage Co., et al., supra,* it was said:

> "The authority of Congress extends to every instrumentality or agency by which commerce is carried on; and the full control of Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operation. The execution of Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere." (*Simpson, et al. v. Shepard,* 230 U.S. 352, 399, and cases cited)

When Congress enacts a law to regulate any phase of interstate commerce, such Federal law has plenary control over the subject and supersedes any state law which may be in conflict with it (*Gibbons v. Ogden,* 9 Wheaton 1, 6 L. Ed. 23).

(See *Regents of University System of Georgia v. Carroll,* 338 U.S. 586, 598-99 (1950; *National Broadcasting Co. v. United States,* 319 U.S. 190, 215-18 (1943); *Arde Bulova,* 11 F.C.C. 137, 149 (1946), aff'd. sub. nom., *Mester Bros. v. United States,* 70 F. Supp. 118 (E.D., N.Y.), aff'd 332 U.S. 749 (1947). See also, F.C.C., Public Service Responsibility of Broadcast Licensees, 9-12, 12-47, 55-56 (1946); 2 Chafee, Government and Mass Communications, 636-

42 (1947) (defending constitutionality of F.C.C. regulatory proposals).

Radio broadcasting consists of three indispensable elements, namely, (1) the transmitter, (2) the connecting medium, or the ether and (3) a receiving set. A loss of any one of the three and you have nothing. Each is indispensable to the other. Thus the transmitter (1) is so essentially a part of (2) the connecting medium or the ether and (3) the receiving set, that you could not have broadcasting without reception or the connecting medium, the ether.

The *Fisher's Blend* case (56 S. Ct. 608) has been misunderstood so many times by careless reading that it needs reaffirmation more than clarification. The court stated on page 610:

> "* * * The essential purposes and indispensable effect of ALL broadcasting is the transmission of intelligence from the broadcasting station to distant listeners. It is that for which the customer pays. By its very nature broadcasting transcends state lines and is national in its scope and importance—characteristics which bring it within the purpose and protection, and subject it to the control, of the commerce clause. See *Federal Radio Commission v. Nelson Bond & Mortgage Co.*, 289 U.S. 266, 279, 53 S. Ct. 627, 77 L. Ed. 1166."

It is noted that the Supreme Court says in the *Fisher's Blend* case, speaking through Mr. Justice Stone in 1936, that "ALL" broadcasting was interstate commerce. The court did not say "a 5000-watt station;" the court said "*all broadcasting.*" The *Fisher's* Blend case was reaffirmed and *augmented* in

Western Livestock v. Bureau of Revenue (1938) 58 S. Ct. 546, which paradoxically enough is a case relied upon by the appellee. Mr. Justice Stone rendered the opinion of the court in the *Western Livestock* case on February 28, 1938, and the case was argued on the theory of "multiple burden" taxation. This case involved a suit by a magazine in New Mexico to prevent a gross receipts tax from being assessed on its distribution of magazines and the magazine publisher (appellant) relied upon the *Fisher's Blend* case. On page 551, in discussing the *Fisher's Blend* case as applied to the *Western Livestock* case, Mr. Justice Stone, the same judge who rendered the opinion in the *Fisher's Blend* case, speaking for the court, stated:

> "* * * In this and other ways the case differs from *Fisher's Blend Station, Inc. v. State Tax Comm'n, supra,* on which appellants rely. There the exaction was a privilege tax laid upon the occupation of broadcasting, which the court held was itself interstate communication, comparable to that carried on by the telegraph and the telephone, and was measured by the gross receipts derived from that commerce. *If broadcasting could be taxed, so also could reception. Station WBT, Inc. v. Poulnot,* D.C., 46 F.(2d) 671." (Emphasis ours)
>
> "Great Britain levies an annual license tax on radio receiving apparatus.
>
> "* * * In that event a cumulative tax burden would be imposed on interstate communication such as might ensue if gross receipts from interstate transportation could be taxed."

Thus the Supreme Court augmented and brought the *Fisher's Blend* case into the "multiple burden" rule.

There is a noticeable absence of this case's ruling in the State Court rulings relied on by defendant (Arkansas and New Mexico decisions—*supra*). We repeat what the court said "*if broadcasting could be taxed, so also could reception.*"

The fact that reception is not taxed does not make the tax as to broadcasting valid. Each is essential to the other. The *mere possibility* that reception could be taxed is sufficient to render the Hawaiian law on broadcasting invalid under the "multiple burden" rule.

In the case of *Joseph v. Carter and Weekes*, 67 S. Ct. 815, 330 U.S. 422 (1947), a gross receipts tax was declared invalid although the possibility of "multiple burden" taxation did not in fact exist as it does in this case. The tax in the *Carter-Weekes* case arose out of a local exicse tax law of the City of New York imposing a two per cent excise tax on the business of stevedoring; that is, loading and unloading of ships, in a New York harbor. The City of New York contended the taxable activity, as the appellee in the case at bar contends the activity of radio, is a local activity of loading and unloading of ships, and the taxable event is so completely disjointed from the actual commerce as to characterize it as an intra-state activity. That is exactly the position the appellee in the case at bar takes with relation to broadcasting. Appellee states that broadcasting in Hawaii is purely an intra-territorial activity and that reception is a mere incident thereto, whether far or near. This contention is made despite the fact Hawaii is encompassed by the Act (see *supra*); and not withstanding, every taxicab, or small boat that has a transmitter must obtain a FCC license to use and oper-

ate such. The Supreme Court of the United States (1947) disagreed and held that the activity of stevedoring was so essentially a part of the commerce itself that the tax was illegal.

In other words, the court reasoned that "if a ship is loaded, it must be unloaded," so to speak. So with Broadcasting, if "intelligence is broadcast, it has to be received," somewhere—far or near. The court stated:

> "* * * Stevedoring, we conclude, is essentially a part of the commerce itself and, therefore, a tax upon its gross receipts or upon the privilege of conducting the business of stevedoring for interstate and foreign commerce, measured by these gross receipts, is invalid. We reaffirm the rule of Puget Sound Stevedoring Company. 'What makes the tax invalid is the fact that there is interference by a state with the freedom of interstate commerce.' *Freeman v. Hewit, supra*, 329 U.S. 249, 256, 67 S. Ct. 274, 279. Such a rule may in practice prohibit a tax that adds no more to the cost of commerce than a permissible use or sales tax. What lifts the rule from formalism is that it is a recognition of the effect of state legislation and its actual or probable consequences. Not only does it follow a line of precedence outlawing taxes on the commerce itself but it has reason to support it in the likelihood that such legislation will flourish more luxuriantly where the most revenue will come from foreign or interstate commerce. Thus, in port cities or transportation or handling centers, without discrimination against outstate as compared with local business, larger proportions of necessary revenue could be obtained from the flow of commerce. The avoidance of such a local toll on the passage of commerce through a locality

was one of the reasons for the adoption of the Commerce Clause."

And, even more clearly, a very recent United States Supreme Court decision restores with sweeping vitality the axiom that no state may tax the privilege of doing an interstate business. In *Spector Motor Co. v. O'Connor*, 71 S. Ct. 508, 340 U.S. 602 (1951) the Supreme Court invalidated the Connecticut Business Tax Act as applied to an interstate trucking concern. The local United States judge first ruled a declaration was in order despite an alleged adequate remedy in the State Courts. The Court of Appeals reversed the local court. Then the Connecticut Supreme Court ruled the tax valid. Then the United States District Court, *who had retained jurisdiction*, found against the tax. The Court of Appeals reversed the trial judge again, then the Supreme Court sustained the trial court. In this case, the taxpayer, a Missouri trucker doing a largely interstate business, attacked the validity of the Connecticut tax. The tax was on net income, and not on gross receipts, thereby making the tax, if anything less objectionable because of the commerce clause aspect. And, just as the appellant in the case at bar, the State of Connecticut relied on the "local incidents" of the interstate commerce to support the tax. The Spector Company had twenty-seven employees, a bank account, *licensed pickup trucks* and two leased terminals within the State. *It performed much business within the State.* Freight was picked up and accumulated through intrastate trips, awaiting full truckloads. But because the ultimate movement of the goods was in interstate commerce, just as the signal from a

broadcasting station is in interstate commerce and is inseparable from that commerce, the Supreme Court held the tax invalid, as an unconstitutional tax on the privilege of engaging in interstate business.

The New Mexico State Supreme Court's decision relied upon by defendant in the case at bar (*Albuquerque Broadcasting Co. v. Bureau of Revenue*, 184 P.(2d) 416) falls of its own weight when careful examination is made of that decision for the court stated::

> "* * * As we understand, it is not held in the *Fisher's Blend* case that *all* broadcasting is interstate commerce."

Thus it is seen that this New Mexico court predicated its reasoning on the ground that the *Fisher's Blend* case did not hold that *all* broadcasting was interstate commerce. The Supreme Court held that *all* broadcasting was commerce, whether five watts or five thousand watts. Neither the New Mexico nor Arkansas cases are worthy of further attention for they are wrong and, as above noted, were based on erroneous reasoning as the *Western Livestock* case, *supra*, and the explanatory remarks of Justice Stone (who wrote the decision in the *Fisher's Blend* case) were deliberately ignored.

As heretofore asserted, the Supreme Court stated that justice should be dispassionate (*supra*). It is not "dispassionate" when state courts ignore Supreme Court of the United States decisions, and Court of Appeals decisions, in order to sustain their own legislatures. The subject matter of radio broadcasting is foreclosed to concern by the states or territories. The

late case of *Dumont Lab. v. Carroll*, 86 F. Supp. 813 (District of Pa. 1949) (affirmed Circuit Court of Appeals, Pa., Sept. 1950; 184 F.(2d) 153, cert. denied by the Supreme Court), so decided.

In this case the Pennsylvania State Board of Censors required all motion picture films intended to be broadcast by television to be submitted to the board for censorship. The action was brought under the Declaratory Judgment Section of the Federal code. The state contended that Congress' denial in the Communications Act of 1934 to the Federal Communications Commission of the power of censorship manifested an intent by Congress to leave the states free to censor programs. Again, as in this case at bar, the defendant alleges Congress contemplated (Sec. 301, Title 47) that some broadcasting was "intrastate." This late case disposes of this contention.

The Pennsylvania television stations contended that the regulation was invalid because it impinged upon a field of interstate commerce which Congress had pre-empted and was inconsistent with the national policy adopted by Congress for the regulation and control of radio and television. It was alleged that it would constitute an undue and unreasonable burden on interstate commerce in radio and television broadcasting. Congress, under the authority of the Commerce Clause had fully occupied the field. The court held:

> "I am satisfied that in the field of television there has been a plenary exercised by Congress of the power to regulate and a complete occupation of the field, including censorship. Under the

> comprehensive scheme of regulation established by the Communications Act, the Commission can exercise effective control over the content of programs, and the fact that this scheme eliminates one particular method of control, namely, censorship in advance of showing, in favor of a less drastic one does not mean that that field is left untouched."

The mere silence of Congress on state taxes on radio, as in television censorship, is a prohibition in itself. The field has been pre-empted by Congress and states cannot concern themselves with the subject matter at all. Radio regulation by Congress is *regulation*—not remedial as was the Seaman's Act.

Radio is akin, in legal analogy, to National banks. Congress took over the subject matter. 99% of a National bank's business is done in the local community, yet states cannot tax this subject matter without the consent of Congress. A national bank license is for no stated term. A radio license is good, however, for only three years and must be renewed. The personnel of a national bank, except the directors, do not have to be approved, yet a radio station is told by law *how*, *when*, *where*, and *for whom* and *how long* it may operate. Every employee operator must be licensed. All equipment and location of studios must be approved. The *extent* of the sensitivity of the regulation is the test of whether Congress pre-empted a subject matter.

The field of radio is a more sensitive form of commerce than National banks. Also, as stated in the *Western Livestock* case, a tax on broadcasting would make possible a tax on reception. Such a "possibility," even though the tax on reception does not exist, is sufficient in law (under *Carter v. Weekes, supra*) to render this tax invalid under the "multiple burden" rule.

CONCLUSION

No suit was pending in the Territory between these parties at the time this action was initiated. The defense of comity did not apply.

All of the essential elements of jurisdiction were present. The issues were plainly ones of law by virtue of both parties filing Motions for Summary Judgment. The ruling of the Supreme Court in *National Broadcasting v. U.S.*, 63 Sup. Ct. 997, 319 U.S. 190, not only made the controversy one of law, but a justiciable case because of appellants' confusion over the law in the light of prior decisions by high Federal Courts' being in conflict with high State Courts' decisions, calling for a Declaration of Rights under the Federal Declaratory Statute.

WHEREFORE, under the equitable powers of this court, the appellant prays that this court may treat this matter now as a problem of first instance. A simple declaration of the law in this case—that the Hawaiian tax law is good or bad constitutionally—

will be decisive of the entire controversy—nationally and locally—for there is a great national interest in this cause.

Respectfully submitted,

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No. 12900

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

J. ELROY MCCAW and JOHN D. KEATING, *Appellants,* vs. TORKEL WESTLY, The Tax Commissioner of the Territory of Hawaii, *Appellee.*	UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

BRIEF FOR APPELLEE

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No. 12900

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

J. ELROY MCCAW and JOHN D. KEATING, *Appellants,* vs. TORKEL WESTLY, The Tax Commissioner of the Territory of Hawaii, *Appellee.*	UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

BRIEF FOR APPELLEE

STATEMENT AS TO JURISDICTION AND QUESTIONS INVOLVED

This is an appeal pursuant to 28 U.S.C. 1291 and 1294 from a judgment of the United States District Court for the District of Hawaii (R. 159-160).

The appellants' complaint invoked 28 U.S.C. 1331, 1332, and 1337. It attacked the validity of, and sought to enjoin the appellee Tax Commissioner from enforcing, a territorial tax law, Chapter 101 of the Revised Laws of Hawaii 1945, and asked for declaratory relief (R. 3-30). The judgment dismissed the action "without prejudice" (R. 159-160), "for the reasons stated in its [the Court's] oral ruling dated January 24, 1951" (R. 160). Said oral ruling was upon the ground that litigation as to the validity of a territo-

rial tax statute should be conducted in the territorial courts, but if (contrary to the Court's conclusions) it should develop that appellants could not obtain hearing on their contentions in the territorial courts then they might return to the federal court (R. 466-471).

Appellee submits that the court below rightly dismissed the action under the Johnson Act (28 U.S.C. 1341) [1] and the policy therein set forth; accordingly the judgment below should be affirmed (Point I of Argument, *infra*). However, looking at the case from the standpoint of appellants' contention that the Johnson Act and the policy therein set forth do not apply, appellee submits that this contention leads only to the conclusion that the case should have been held in the District Court awaiting the outcome of litigation in the territorial courts (Point II of Argument, *infra*). The case is very far from having reached the point of decision on the merits; in no event could it result in the summary judgment which appellants (Br. 39-64) seek here. This aspect of the case is Point III of the Argument, *infra*.

It thus appears that if there was error in the court below it consisted only in the proposition that the District Court should have held the case instead of dismissing it without prejudice. Under the "harmless error" rule this would not be reversible error. The judgment below should be affirmed as correct, or the appeal dismissed because nothing of substance is involved.

Alternatively, the Court might hold this case on its docket pending final disposition of the similar litigation in the territorial courts.[2] That litigation was instituted by these appellants in the Circuit Court of the Territory, First Circuit. It has been tried and judgment has been rendered for

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[1] "§ *1341. Taxes by States.* The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

[2] *Georgia R.R. and Banking Co.* v. *Redwine,* 339 U.S. 901, 342 U.S. 299, 863, p. 18, *infra*.

appellee. It is about to be appealed to the Supreme Court by these appellants (Br. 12), and is appealable from the Supreme Court to this Court. Decision thereon in this Court would dispose of the present case as well.

STATEMENT OF THE CASE

Appellants are a co-partnership known as Island Broadcasting Company, operating radio station KPOA in Honolulu, Territory of Hawaii. On November 15, 1950 they filed this action in the United States District Court (R. 3-30). The complaint set forth that Congress had preempted the subject matter of radio broadcasting to the exclusion of state and territorial taxation (Br. 3), and that appellants' broadcasting was so essentially interstate commerce that it could not be taxed (R. 14-20, 24). Appellants moved for a temporary injunction (R. 36), and for summary judgment (R. 113-131).

Appellee filed a motion to dismiss the complaint, attacking it for failure to show grounds for equitable relief, for failure to take the case out of the Johnson Act (28 U.S.C. 1341) and the policy therein set forth, and upon other grounds (R. 36-40). Appellee also filed Objections to the Motion for Interlocutory Injunction (R. 40-52), and a Motion for Summary Judgment (R. 141-144).

Each party filed supporting affidavits and exhibits. Appellants' appear at R. 30-35, 114-131, 154-157 together with a number of unprinted exhibits; appellee's appear at R. 52-113, together with a number of unprinted exhibits. Appellee attempted to narrow the factual disputes by a Request for Admission of Facts (R. 144-146), but after the Answer to the request had been received (R. 148-154) little had been accomplished toward that end.

The extent to which facts are undisputed, and the extent to which disputed, will be set forth in the Argument in this brief. The appellants' analysis is far apart from the record, the case being treated by them as if only a Motion

to Dismiss had been filed without any other showing, and as if all the pleadings were in and appellee had stood upon that motion.

When the cause came on for hearing on the motions the Court "laid aside the various motions of the parties and raised on its own the question of whether or not it had jurisdiction and if so, should it as a matter of judicial discretion exercise the same" (R. 159). After hearing argument thereon, for which very considerable time was allowed, the Court ruled:

> That the Territory of Hawaii is so constituted under the Hawaiian Organic Act that its tax litigation is protected by the Johnson Act (28 U.S.C. 1341) and the policy therein set forth (R. 468).
>
> That the remedy of the taxpayers was to pay under protest and sue for a refund in the territorial court, this being an adequate statutory remedy and there being adequate provision for interest (R. 469).
>
> That under the statute penalties became part of the tax and were recoverable if the tax was recoverable (R. 469).
>
> That if grounds for an equity application existed the taxpayers could resort to the equity court of the Territory, there being no statute prohibiting such an equity suit (R. 470).
>
> That the complaint would be dismissed but such dismissal would be without prejudice, in order that appellants might return to the federal court if, contrary to the conclusions reached, the appellants could not obtain hearing on their contentions in the courts of the Territory (R. 471).

The above ruling was made January 24, 1951 and Judgment Dismissing the Action Without Prejudice was entered thereon February 5, 1951 (R. 159-160). A week later appellants filed a "Motion to Set Aside, or to Modify,

Judgment Dismissing Action Without Prejudice" (R. 160-163); this motion announced the intention of appellants to pursue a remedy in the territorial courts and asked that the present case be retained meanwhile instead of being dismissed, appellants' view being that if this were done an appeal would not be necessary "until a complete answer is obtained in the Territorial Courts as to whether Plaintiffs have or have not a remedy therein" (R. 161). This motion was denied on the ground that the matter of retention of jurisdiction pending pursuit of a territorial remedy was fully considered upon the original argument (R. 163-164).

Appellants thereafter brought an action in the Circuit Court of the Territory, First Circuit, employing the statutory remedy of payment under protest followed by suit for recovery.[3] After the action was at issue in the circuit court on the appellants' complaint, the appellee's answer and counterclaim, and the appellants' replication thereto, appellants applied to the Circuit Court for a stay of the proceedings they had instituted. This having been denied and the case having been set for trial appellants applied to the Supreme Court of Hawaii for a writ of prohibition to forbid further proceedings in the Circuit Court. This writ was denied in an opinion rendered November 26, 1951,[4] from which the above cited facts appear.

From here on, the facts as to the territorial litigation are not of record, but it is conceded by appellants that the cause has been tried and has been decided against them in the Circuit Court (Br. 12).[5] Appellants presently are appealing from the decision of the Circuit Court of the Territory to the Supreme Court of Hawaii (Br. 12). When that case reaches this Court the record will show that the complaint

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[3] Section 1575, Revised Laws of Hawaii 1945. See *infra*, p. 11.

[4] *McCaw and Keating* v. *Willson C. Moore as Judge of the Circuit Court,* Supreme Court of Hawaii No. 2881, 39 Haw. 157.

[5] Appellants having offered to produce the oral and written decision of the Circuit Court (Br. 13) appellee will refer to it in the Argument, *infra*.

in the territorial court is practically the same as the complaint in the court below.

ARGUMENT

I

THE COURT BELOW RIGHTLY DISMISSED THE ACTION UNDER THE JOHNSON ACT AND THE POLICY THEREIN SET FORTH.

A. **Scope of the Act; the policy involved.** The Johnson Act (28 U.S.C. 1341) provides that:

> "§ **1341. Taxes by States.** The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

This statute is derived from the Act of August 21, 1937.[6] It was founded on the already long established policy of remitting taxpayers to their remedies in the state courts where adequate.[7] Congress particularly desired to free, from interference by federal courts, state procedures which authorize litigation challenging a tax only after the tax has been paid.[8] Under the statute and long established policy on which it was based, it is true, whether the relief sought is equitable or declaratory, that:

> "* * * it is the court's duty to withhold such relief when, as in the present case, it appears that the state legislature has provided that on payment of any chal-

[6] 50 Stat. 738, c. 726, amending the first paragraph of section 24 of the old Judicial Code, former 28 U.S.C. 41 (1). The Act added a sentence to provide that "no district court shall have jurisdiction" of any suit to restrain state tax collection where an adequate state court remedy exists "at law or in equity." The Reviser's Notes show that section 1341 restates this sentence, the words "at law or in equity" having been omitted as unnecessary.

[7] *Great Lakes Dredge & Dock Co.* v. *Huffman,* 319 U.S. 293, 297-301, citing *Matthews* v. *Rodgers,* 284 U.S. 521, 525-6.

[8] *Great Lakes Dredge and Dock Co.* v. *Huffman, supra,* citing S. Rep. No. 1035, 75th Cong., 1st Sess.; H.R. Rep. No. 1503, 75th Cong., 1st Sess.

lenged tax to the appropriate state officer, the taxpayer may maintain a suit to recover it back."[9]

The Johnson Act and the policy there stated apply, as well, when the taxpayers can be heard in a state court for equitable relief. A decisive case is *Whitmore* v. *Ormsbee,* 329 U.S. 668, aff'g per curiam 64 F. Supp. 911. That was an action to enjoin enforcement of the New Mexico privilege tax upon radio stations, measured by the gross receipts from radio broadcasting and similar to the tax involved here. A three judge court held that radio broadcasting is in part intrastate commerce and in part interstate commerce (the court citing the *Fisher's Blend case,* 297 U.S. 650, which appellants here interpret differently), that the question involved was whether the state tax imposed an undue burden upon the interstate commerce, that the Johnson Act applied to this question as well as any other, that the ordinary method of payment under protest was adequate, and that if this method should be burdensome by reason of the large amount of accumulated back taxes and penalties, then equitable relief in the state court would be an adequate remedy, and this notwithstanding a state statute forbidding injunctive relief in tax cases which, however, the state courts had held did not apply in extraordinary circumstances. Hawaii has no statute limiting injunctive relief in tax cases.

When the Supreme Court of the United States affirmed the *Whitmore* case per curiam, it was upon the authority of *Hillsborough v. Cromwell*[10] upon which appellants rely, and *Matthews v. Rodgers, supra.*[11]

B. **Applicability of the Johnson Act in Hawaii.** The Johnson Act and the policy there stated apply in Hawaii.

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[9] *Great Lakes Dredge and Dock Co.* v. *Huffman, supra,* 319 U.S. at pp. 300-301 (a declaratory relief case); *Toomer* v. *Witsell,* 334 U.S. 385, 392 (injunctive relief case).

[10] 326 U.S. 620, 623.

[11] 284 U.S. 521, 525, note 7, *supra.*

The courts of the Territory of Hawaii occupy a relatively similar position to the federal courts as do state courts, and this principle makes applicable the rules of law as to the types of litigation to be left by federal courts to state courts.[12] Such a rule is involved here.

It is not material whether the Johnson Act applies by its terms, the word "state" being read to include territories as it sometimes is,[13] or whether it applies because the Hawaiian Organic Act and the case law make applicable the policy stated in the Johnson Act.[14] Whether or not the statute literally applies it was the court's duty to adhere to the long standing policy expressed in it.[15]

C. **Appellants did not meet the Johnson Act.** The complaint set forth that the time for appeal to territorial courts had expired (R. 27, par. XXIV) ; that if the tax were paid the defendant would not have sufficient means to respond to a judgment for its recovery (R. 28, par. XXV) ; that "the slightest financial burden" would affect appellants and they had invested in the station in the belief that Congress had preempted the field of radio communication (R. 8, par. V; R. 22-23, par. XIX) . These, and other contentions since made, will be considered in the following paragraphs. In none of them did the appellants meet the Johnson Act or the policy there set forth.

1. The appellants' theory that, by letting their time for appeal expire, they excused themselves from resorting to territorial courts, in any event is met by the fact that another remedy remained, that of payment under

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[12] *Stainback* v. *Mo Hock Ke Lok Po,* 336 U.S. 368, 383; *Ackerman* v. *I.L.W.U.,* 187 F. 2d 860, 868 (C.A. 9th), cert. denied 342 U.S. 859; *Alesna* v. *Rice,* 172 F. 2d 176, 178-9 (C.A. 9th), cert. denied 338 U.S. 814; *Wilder S.S. Co.* v. *Hind,* 108 Fed. 113, 115, 116 (C.A. 9th), aff'd 183 U.S. 545.

[13] *Andres* v. *United States,* 333 U.S. 740, 745; *Waialua Co.* v. *Christian,* 305 U.S. 91, 109, 138.

[14] Note 12, *supra.*

[15] *Great Lakes Co.* v. *Huffman,* supra; *United States* v. *City of New York,* 175 F. 2d 75 (C.A. 2d), cert. denied 338 U.S. 885.

protest followed by suit for recovery under the statute, section 1575 of the Revised Laws of Hawaii 1945. Under this latter statutory remedy the territorial litigation brought by appellants has proceeded.

Moreover, *Hillsborough v. Cromwell,* 326 U.S. 620, on which appellants rely (Br. 31) does not hold that one can take himself out of the Johnson Act by ignoring his state remedy; it holds that a state remedy is inadequate which affords no reduction of a tax assessment in the event of discriminatory taxation, permitting only that the taxpayer discriminated against obtain an increase in the taxes of others. Reference by the court to the expiration of time for appeal to the State Board of Tax Appeals[16] was upon consideration of the question whether the rule of *Spector Motor Co. v. McLaughlin*[17] should be applied.

2. The allegation in the complaint that if the tax were paid the defendant would not have sufficient means to respond to a judgment for its recovery, overlooks that the suit for recovery is not against the Tax Commissioner personally but to the contrary is a statutory remedy that in effect is a suit against the Territory of Hawaii.[18] This statutory remedy has been employed in the Territory in many instances to determine the applicability and validity of territorial tax laws.[19]

3. The allegation in the complaint that the imposition of the tax was unexpected and any tax at all would be a burden, is met by *Whitmore v. Ormsbee, supra,* which holds that if there are extraordinary circumstances preclud-

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[16] 326 U.S. at p. 628; Br. 32. See p. 7, *supra.*

[17] 323 U.S. 101, *infra* Point II.

[18] *Wright* v. *Borthwick,* 34 Haw. 245, 255; *Great Northern Insurance Co.* v. *Read,* 322 U.S. 47; *Ford Co.* v. *Department of Treasury,* 323 U.S. 459.

[19] *Brodhead* v. *Borthwick,* 174 F. 2d 21 (C.A. 9th), aff'g 37 Haw. 314, cert. denied 338 U.S. 847; *Pan American Airways* v. *Godbold,* 36 Haw. 170; *Wright* v. *Borthwick, supra,* 34 Haw. 245; *Bishop* v. *Hill,* 33 Haw. 371; *New York Life Ins. Co.* v. *Hapai,* 21 Haw. 424.

ing resort to the ordinary method of payment under protest, then resort should be had to the state equity court, the Johnson Act having the effect of remitting the taxpayer there. Moreover, this allegation falls short of an allegation of inability to pay. Instead, the complaint alleges refusal to pay (R. 28, Par. XXV). Furthermore, appellee showed by the affidavit of the deputy tax commissioner and the books of the company (these exhibits being incorporated by reference in the Objections to Interlocutory Injunction [R. 51] and Motion for Summary Judgment [R. 143]) that the imposition of the tax was not unexpected or beyond the financial ability of the company. The tax was returned and paid for the first fourteen months of the station's existence (R. 53). The claim that broadcasting income could not be taxed first was presented in the report of income for December, 1947 (R. 54). On July 20, 1948, the Tax Commissioner sent the taxpayer a preliminary notice of assessment (R. 56) and at that time the taxpayer set up a reserve for the tax (R. 102) which has continued to be maintained (R. 100-102). Over and above the sums required to maintain this reserve for the tax, the taxpayer earned profits (R. 93-99) which in 1950 were coming in at the rate of $8000 per month (R. 98-99). The working-capital position (ratio of current assets to current liabilities inclusive of the contested tax) was better than 3 to 1 (R. 107-108).

There was no offer to meet the foregoing facts. While appellants in oral argument offered to show (R. 383-384) why they drew so heavily on their partnership earnings just before they commenced this suit (R. 111) and after the tax was demanded (R. 59-60), irrespective of the reason for this the financial condition of the company, even after these drawings, was as already stated.

4. In oral argument appellants made the further contention, not contained in the complaint,[20] that if they

[20] Citations in the brief of what "was alleged" in this regard (Br. 9, 30) are citations to the record of oral argument.

paid under protest and were successful in sustaining their contentions as to the invalidity of the tax, they would not be refunded that portion of their payment consisting in the penalties and interest by which the tax had increased during the period of non-payment preceding resort to the remedy of payment under protest. Appellants' brief relies on this argument (Br. 5, 9-10, 30-31, 34-35). It is based on statutory provisions not here involved; in any event it is erroneous.

Unquoted by appellants is the statute providing for payments under protest, the statute under which the parallel territorial litigation actually has proceeded, section 1575 of the Revised Laws of Hawaii 1945, which provides in pertinent part as follows:

> "**Sec. 1575. Payment to Territory under protest.** Moneys representing a claim in favor of the Territory may be paid to a public accountant of the Territory under protest in writing signed by the person making such payment, or by his agent, setting forth the grounds of such protest, in which event the public accountant to whom such payment is made shall hold the money so paid for a period of thirty days from the date of payment.
>
> Action to recover the money so paid, or proceedings to adjust the claim may be commenced by the payer or claimant against the public accountant to whom the payment was made, in a court of competent jurisdiction, within such period of thirty days, and in default of bringing such suit or proceedings within such period, the money so paid shall be by such accountant deposited in the treasury of the Territory, and the same shall thereupon become a government realization.
> *******"

The action is to recover "money so paid", "representing a claim in favor of the Territory". The action could be brought in protest of claims for rent of public lands, tariffs of the Board of Harbor Commissioners, taxes, penalties, or any other protested claim.

Appellants' argument (Br. 10) seeks to overlay on section 1575 certain administrative tax appeal provisions that are not involved and on which appellants place a forced misconstruction. There are short answers to the argument. First, if any territorial officer so misconstrued the tax appeal provisions that misconstruction could be protested under section 1575, such being the purpose of the section. Second, the argument assumes, in flat disregard of the pertinent statutory provision[21] that the word "tax" does not include penalties and interest added to the tax and becoming "a part of such tax", as the statute quoted in note 21 provides. Of course the rule is that words used in a statute mean what the statute says they mean.[22] Contrary to appellants' implication that the court and appellee dodged the issue (Br. 10), this obvious answer was made by appellee in argument (R. 272) and the court so ruled, saying:

> "***the particular law under which taxes claimed to be due makes any penalty that is assessable a part of the tax, and if the tax is recoverable, why, the part goes with it, for the whole consists of all of its parts." (R. 469).

Of course if the tax is valid and not refundable the penalties are not refundable either. The rule in Hawaii is the usual rule which this Court has followed,[23] i.e. where the tax law provides for penalties and interest, one who contests

[21] "*Sec. 5463. Penalty for delinquency.* A penalty of ten per centum shall be added to and become a part of any tax or portion thereof becoming delinquent, and in addition thereto said tax as so increased shall bear interest at the rate of two-thirds of one per centum for each month or fraction thereof from the expiration of fifteen days from the date of delinquency until paid, which interest shall be added to and become a part of such tax."

[22] *Fox* v. *Standard Oil Co.*, 294 U.S. 87, 95, stating the general rule; *State of California* v. *Hisey,* 84 F. 2d 802, 805 (C.A. 9th) stating the rule that penalties and interest are a part of a tax when and to the extent that the tax statute so provides.

[23] *Washington Water Power Co.* v. *Kootenai County,* 270 Fed. 369, as modified 273 Fed. 524 (C.A. 9th), following *Spencer* v. *Babylon R. Co.,* 250 Fed. 24 (C.A. 2nd) and other cited cases; *State of California* v. *Hisey, supra,* 84 F. 2d 802, 805 (C.A. 9th).

a tax is liable to penalties and interest upon the amount unpaid if found to be legally due. Under this rule the taxpayer, in whatever tribunal he litigates the validity of the taxes, does so in peril of the penalties and interest accrued for non-payment.[24]

The tax law here involved attaches no penalties or interest to taxes on duly reported income claimed to be exempt until after at least thirty days preliminary notice of proposed assessment followed by actual assessment and the lapse of twenty-one days thereafter.[25] At that time there expires the opportunity for an administrative appeal[26] to a Board of Review or the Tax Appeal Court (whence an appeal lies to the Supreme Court of Hawaii) and the tax becomes delinquent and carries a lump sum penalty plus a monthly addition after fifteen further days.[27] Where the tax is assailed as invalid or inapplicable the remedy of payment under protest still remains under section 1575 of the Revised Laws of Hawaii 1945, *supra.*

The regular assessment procedure was followed (R. 56-57, 59-61). Appellants let the taxes go delinquent and the time for appeal expired. Then suit was commenced in the court below, followed by the suit in the Circuit Court of the Territory brought by appellants under section 1575.

Section 5535, Revised Laws of Hawaii 1945, quoted in part on page 9 of appellants' brief, is the administrative appeal provision of the net income tax law, not the tax law involved. The only bearing of section 5535 is that in section 5473, the administrative appeal provision of the tax law

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[24] *Spencer* v. *Babylon R. Co., supra.*

[25] Section 5467, Revised Laws of Hawaii 1945, as amended by Act 253, Session Laws of Hawaii 1945 and Act 111 Session Laws of Hawaii 1947.

[26] Section 5473, Revised Laws of Hawaii 1945, as amended by Act 92, Session Laws of Hawaii 1945; and Chapter 95, Revised Laws of Hawaii 1945.

[27] Section 5463, quoted in note 21.

here involved,[28] the details as to time, method of appeal and procedure are supplied by reference both to section 5535 and to Chapter 95, Revised Laws of Hawaii 1945, an administrative appeal chapter of general application in tax matters.

Section 5535 of the net income tax law, on which appellants rely, is quoted in full in the note.[29] The last sentence of the last paragraph commences with the words:

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[28] "*Sec. 5473. Appeal; correction of assessment.* If any person having made the return and paid the tax for any month or any year as provided by this chapter feels aggrieved by the assessment so made upon him by the tax commissioner, he may appeal from said assessment in the manner and within the time and in all other respects as provided in section 5535. The hearing and disposition of such appeal, including the distribution of costs and of taxes paid pending the appeal, shall be as provided in chapter 95."

[29] "*Sec. 5535. Appeal.* Unless otherwise barred by the provisions of this chapter from so doing, any taxpayer who has made an income tax return as aforesaid, or against whom has been made an additional assessment under section 5530, paragraph (2), or an assessment under section 5528, may appeal from the assessment within the time hereinafter set forth, either to the divisional board of review or to the tax appeal court, in the manner and with the costs provided by chapter 95, except as otherwise in this chapter provided.

If the appeal is first made to the board, the appeal shall either be heard by the board or be transferred to the tax appeal court for hearing at the election of the taxpayer, and if heard by the board an appeal shall lie from the decision thereof to the tax appeal court and to the supreme court in the manner and with the costs provided by chapter 95. The supreme court shall prescribe forms to be used in such appeals which shall be as nearly identical as practicable with the forms prescribed or permitted by law in the case of property tax appeals; *provided,* that such forms shall show the amount of taxes upon the basis of the taxpayer's computation of taxable income, the amount of taxes upon the basis of the assessor's computation, the amount of taxes upon the basis of the decisions of the board of review and tax appeal court, if any, and the amount of taxes in dispute. If or when the appeal is filed with or transferred to the tax appeal court, the court shall proceed to hear and determine the appeal, subject to appeal to the supreme court as is provided in chapter 95.

Any taxpayer appealing from any assessment of income taxes shall lodge with the assessor or assistant assessor a notice of the appeal in writing, stating the ground of his objection to the additional assessment or any part thereof, which notice of appeal shall be filed at any time within twenty days subsequent to the date

"No taxpayer shall be exempt from delinquent penalties by reason of having made an appeal on his assessment,****" These words have to do with net income tax appeals; the tax law here concerned is bottomed on the premise that the tax will be paid (and under Chapter 95 held in a special deposit) before taking of the appeal,[30] hence envisages no delay in payment by reason of the making of an appeal. The net income tax law, however, does not require that the tax be paid as a condition of the appeal, hence in the above quoted words it sounds a warning that the usual rule[31] will be invoked, i.e. the decision to litigate will not excuse the litigant from penalties and interest if he proves to be wrong. The net income tax provision then continues with the assurance (also contained in Chapter 95) that the taxpayer's payment will be held in special deposit awaiting the final determination of the appeal. In describing the payment as "the tax paid", the legislature included penalties and interest added to the tax and becoming a part of it.[32] The "tax paid", i.e. as originally assessed, or as increased by penalties and interest, will be repaid whenever it is determined that it was upon non-taxable valuation or income, as the case may be. That is what Section 5535, and Section 5219 of Chapter 95 (Br. 9), provide.

5. In their brief in this Court appellants for the first time contend that the Territory "agreed to this suit in the Federal Court", and is not in a position to contest its being heard there (Br. 4-9). This is not correct. Appellants' brief quotes portions of the oral argument. In other

when the notice was mailed properly addressed to the taxpayer at his last known residence or place of business. No taxpayer shall be exempt from delinquent penalties by reason of having made an appeal on his assessment, but the tax paid, covered by an appeal duly taken, shall be held in a special deposit and distributed as provided in section 5219, for which purpose the word 'valuation' shall be deemed to refer to the amount of income."

[30] Note 28, *supra.*

[31] Notes 23-24, *supra.*

[32] Note 22, *supra.*

portions of the argument appellants' counsel admitted that the Territory always had disagreed with appellants' position that the federal suit was the proper remedy and had made no agreement to waive the point (R. 226, 264-266, 290-293, 330). The following quotations from the argument make the point clear:

"****

> The Court: It was last summer that you said that the [52] Territory demanded that it be paid, is that it?
>
> Mr. Davis: Yes, sir, that was the time, last summer. So I wrote to the Attorney General and got 60 days in which to prepare this case, and they very graciously gave it to me. And I told Miss Lewis at the time, *and I told the Attorney General, that if anything occurred by virtue of their graciousness to me, that I would be very glad to waive it myself*. So it was in November that I filed the suit and it has been brought up to the moment.

****"

(R. 226; italics added.)

"****

> Miss Lewis: Certainly it was my understanding, part of our understanding, that pending the application for a temporary injunction we weren't going to sue. In other words, Mr. Davis was given this opportunity to pursue what he thinks is the proper remedy, and which *we have stated from the beginning we considered not the proper remedy*.
>
> The Court: So that the problem I alluded to is in general covered by agreement of Counsel?
>
> Miss Lewis: The problem you alluded to is, why we haven't sued, and that is the reason.
>
> The Court: All right.
>
> Mr. Davis: Since I came into the case it was August, I think, wasn't it?
>
> Miss Lewis: Well, . . .
>
> Mr. Davis: Everything we agreed to that you said about yourself is true, since August.

****"

(R. 265-266; italics added.)

In any event, the Court could not be precluded from disposing of the case under the Johnson Act policy, because it was the Court's duty to do so.

6. Appellants now contend that appellee agreed with appellants that in the suit in the territorial court "a general denial would be interposed by appellee and the issues simplified as to the Constitutional questions" (Br. 11-12). Appellee categorically denies this; the Territory was free to plead as best suited its case. The matter is outside the record and in any event immaterial.

7. Appellants (Br. 12-13) assail the local practice in the matter of the form of decision. Again this is outside the record. The attorney who wrote appellants' brief is not a member of the Hawaii bar and is not in a position to inform this Court as to the local practice. When the record from the territorial court reaches this Court it will show that:

On January 11, 1952, after the taking of evidence had been concluded, appellee served and presented to the Court "Proposed Findings and Conclusions". On January 14, 1952 the case was argued. On January 15, 1952 the Court rendered its oral decision in favor of appellee, and inter alia approved the proposed findings. On January 28, 1952, after opposing counsel had had for a week the draft of written decision prepared by appellee's counsel, it was submitted to the judge, who made some changes in it. The written decision specifically stated that the "oral decision, as reflected in the official reporter's notes, is incorporated herein by reference". At the hearing on the form of decision, which was held on January 28, 1952, appellants' counsel made no objections to the form, simply taking the usual exception.

On January 31, 1952, prior to the entry of judgment, appellants filed a motion to strike the decision, for the first time assailing the local practice. This motion did not set forth any lack of opportunity to be heard. It did not point

out wherein the decision contained anything to which appellee was not entitled upon the record, stating in general terms that the decision "is not founded upon the law or any evidence in the record and does not conform to the oral decision of this Court". Detailed exceptions to the decision were filed on the same day, and were duly reviewed by the Court. All of appellants' rights were protected.

8. Concluding this point, appellee calls attention to the case of *Georgia R. R. and Banking Co. v. Redwine, supra.*[33] There, on a mere suggestion by the Attorney General of Georgia that there was an adequate state court remedy, a case that had made its way up to the Supreme Court was "ordered continued for such period as will enable appellant with all convenient speed to assert such remedies". It was not until the state court remedies had been tried and had been proved inadequate that the case was finally heard in the Supreme Court; it then was remanded to the District Court for determination of the merits. This case demonstrates the strength of the Johnson Act policy.

II

IF THE JOHNSON ACT AND THE POLICY THEREIN SET FORTH WERE INAPPLICABLE, THE DISTRICT COURT NEVERTHELESS WOULD HAVE HAD TO HOLD THE CASE AWAITING THE OUTCOME OF TERRITORIAL LITIGATION AND APPELLANTS HAVE NOT BEEN PREJUDICED.

Under the rule of *Spector Motor Co. v. McLaughlin,* 323 U.S. 101, 104, 105-106, if the Johnson Act and the policy therein set forth did not apply nevertheless this case would have had to be held in the District Court awaiting the outcome of territorial litigation. This was true because the scope and application of the tax law in respect of radio broadcasting had not been determined by the territorial courts. (See R. 301-302, 379-382.) The rule that state

[33] 339 U.S. 901, 342 U.S. 299, 863, cited in note 2, *supra.*

courts must construe state statutes before constitutional issues are reached, applies in the Territory of Hawaii.[34]

The Circuit Court of the Territory held that "the territorial tax law has been and is properly interpreted and applied by the Tax Commissioner and the law and assessments made thereunder are valid". That case now goes to the Supreme Court of Hawaii whence it is appealable to this Court and will be in a form to permit of decision on the points of constitutional law.

One has only to consider the fate of the *Spector Motor Co. case,* in which eight and a half years elapsed between the first decision,[35] and final disposition,[36] to understand the Territory's insistence that the present matter be decided on the record from the territorial court.

In the court below appellants conceded that there would be no reversible error in the denial of an injunction, and that what they really were seeking was declaratory relief (R. 374).[37] They further conceded (R. 160-163) that they would not be harmed if the case were held by the District Court awaiting the outcome of territorial litigation, which would be the *Spector Motor Co.* rule applicable if the Johnson Act policy were not. It does not appear wherein they have been harmed because instead of holding the case, the District Court dismissed it without prejudice.[38]

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[34] *Stainback* v. *Mo Hock Ke Lok Po,* supra, 336 U.S. 368, 383.

[35] 47 F. Supp. 671.

[36] 340 U.S. 602.

[37] As to the case below being insufficient to support an injunction see the complaint (R. 28, par. XXV), which falls short of showing threats to seize property and harass the appellants with a multiplicity of suits. *Boise Artesian Water Co.* v. *Boise City,* 213 U.S. 276, 282, 286; *Henrietta Mills* v. *Rutherford Co.,* 281 U.S. 121, 123-4; *Rieder* v. *Rogan,* 12 F. Supp. 307, 318 (D.C.S.D. Cal.). The mere prospect of an action in the state court is not a ground for federal injunctive relief, though the subject matter is the same, where both are in personam. *Kline* v. *Burke Construction Co.,* 260 U.S. 226, 230; *Mandeville* v. *Canterbury,* 318 U. S. 47, 49.

[38] "Rule 61. Harmless Error. No error in either the admission or the exclusion of evidence and no error or defect in any ruling

III

THIS APPEAL CANNOT RESOLVE THE MERITS; IN NO EVENT COULD IT RESULT IN THE SUMMARY JUDGMENT WHICH APPELLANTS SEEK.

A. **This appeal cannot resolve the merits of the litigation.** The case below was "dismissed without prejudice" on the threshold. That this Court should proceed to the merits is inconceivable.[39] As an aid to the Court in appraising the situation, appellee submits his analysis of the points of law and fact involved:

B. **Radio broadcasting consists in both intrastate and interstate commerce, hence there is an area for state taxation.** This proposition was foreshadowed in the case of *Fisher's Blend Station v. State Tax Commission,* 297 U.S. 654, 656, 1936, and confirmed when, in *Vinsonhaler v. Beard,* 338 U.S. 863, 1949, rehearing denied 338 U.S. 896, the Supreme Court dismissed for want of a substantial federal question, the appeal taken as a matter of statutory right from the state court decision in *Beard v. Vinsonhaler,* 215 Ark. 389, 221 S.W. 2d 3. This now will be developed at more length.

Fisher's Blend Station v. State Tax Commission, supra, arose in a Washington State court, whence it reached the Supreme Court of Washington in 1935,[40] and the Supreme Court of the United States in 1936.[41] The case involved two radio stations, one a "Clear Channel" station, and the other

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or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

[39] *McDonald* v. *Smalley,* 1 Peters 620, 7 L. ed. 287; *Bradstreet* v. *Potter,* 16 Peters 317, 10 L. ed. 315.

[40] 182 Wash. 163, 45 P. ed. 942.

[41] 297 U.S. 650.

a "Regional" station. The case went up on stipulated facts[42] among them:

> "That a Clear Channel station is assigned a radio frequency by the Federal Radio Commission which ***is *designed and calculated for the effective transmission of radio broadcasting over the entire area of the United States****; that a Regional station is assigned a radio frequency band by the Federal Radio Commission for the effective transmission of radio broadcasting over the zone in which it is located and, therefore, is *designed and calculated for the effective transmission of radio broadcasting over the entire area of the zone in which it is located****"[43]
>
> That** Stations KOMO and KJR have been and now are engaged in broadcasting commercially in said manner***; that said broadcasting has covered said designated areas***, and that such broadcasting has been continuous and effective and*** has furnished an effective and valuable medium of advertising***
>
> ***that the gross income from the business***arises out of payments made by the National Broadcasting Company, Inc. for the broadcasting of said National and Pacific Coast programs, in the manner hereinabove described, and payments made by commercial advertisers, for programs originating at Stations KOMO and KJR and other stations situate in other states, such as KGW in Portland, Oregon, connected by wire with Stations KOMO or KJR, *who desire to reach the listening public in the areas and territories hereinabove described.*"
>
> (italics added.)

The Supreme Court of the United States, after reciting the substance of the foregoing facts which, as the Court noted, were stipulated, held (1) that radio transmission "in all essentials" is like transmission by telegraph or tele-

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[42] 297 U.S. at p. 651. Quotations that follow are from the record in the case, No. 628, Supreme Court of the United States, October Term, 1935.

[43] Under the regulations then in effect the United States was divided into five zones.

phone;[44] (2) that the business of the company was the transmission of advertising programs from its stations in Washington to listeners in other states;[45] (3) that the company's "entire income consists of payments to it by other broadcasting companies or by advertisers***" and "the customers desire the broadcasts to reach the listening public in the areas which appellant serves***";[46] (4) that "by its very nature broadcasting transcends state lines and is national in its scope and importance";[47] (5) that the taxed income was derived from "appellant's entire operations, which include interstate commerce", and "as it does not appear that any of the taxed income is allocable to intrastate commerce, the tax as a whole must fail."[48] It is important to note that the stipulated facts did not show any income from intrastate communications. Both of the stations offered commercial service over wide areas and all the advertisers desired to reach this widespread listening public.

The portion of the opinion numbered (4) in the foregoing paragraph is the portion on which appellants rely (Br. 55). But that was stated in connection with the argument, made by the State of Washington and erroneously upheld in the state supreme court, that the stations were merely furnishing local facilities and were unlike telegraph and telephone companies because they owned no facilities at point of reception. That argument has been set at rest. In disposing of it the Court held that radio broadcasting was interstate commerce, not that it was exclusively such.

State supreme courts in New Mexico[49] and Arkansas[50] have held that the radio broadcasting business is intrastate

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[44] 297 U.S. at p. 654.

[45] 297 U.S. at p. 654.

[46] 297 U.S. at p. 652.

[47] 297 U.S. at p. 655.

[48] 297 U.S. at p. 656.

[49] *Albuquerque Broadcasting Co.* v. *Bureau of Revenue,* 51 N.M. 332 and 54 N.M. 133, 184 P. 2d 416 and 215 P. 2d 819.

[50] *Beard* v. *Vinsonhaler, supra,* 215 Ark. 389, 221 S.W. 2d 3, appeal dismissed for want of a substantial federal question, 338 U.S. 863, rehearing denied 338 U.S. 896.

as well as interstate. Appellants concede that these cases so hold (Br. 29, 49, 60). The New Mexico tax was on business done within the state, including the business of radio broadcasting, measured by the gross receipts. The Arkansas tax was a flat license fee upon "the business of intrastate radio broadcasting". The New Mexico state court case did not go to the Supreme Court of the United States. The Arkansas case was appealed as a matter of statutory right,[51] not by petition for certiorari as appellants persist in representing (Br. 49). The appeal was dismissed for want of a substantial federal question[52] on the authority of *Crutcher v. Kentucky,* 141 U.S. 47;[53] rehearing was denied[54] despite a petition for rehearing that warned that citation of the *Crutcher case* would give the dismissal of the appeal great significance.[55] Appellee regards the action of the Supreme Court in this case as a definite holding[56] that, in the field of radio broadcasting, there is an area for state taxation.

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[51] 28 U.S.C. 1257 (2).

[52] 338 U.S. 863, 1949.

[53] The Court did not say to what part of the *Crutcher case* it referred but it is worthy of note that in the *Crutcher case* it had said: "But taxes or license fees in good faith imposed exclusively on express business carried on wholly within the state would be open to no such objection." (141 U.S. at p. 59).

[54] 338 U.S. 896.

[55] Pp. 5-6 of Petition for Rehearing in No. 342, Supreme Court of the United States, October Term, 1949.

[56] Undoubtedly the dismissal by the Supreme Court of a statutory appeal for want of a substantial federal question is a decision having weight as precedent. For example, in *Nesbitt* v. *Gill,* 332 U.S. 749, the Court affirmed the decision below on the authority of *Bacon & Sons* v. *Martin,* 305 U.S. 380, which was a dismissal for want of a substantial federal question, and in *Breard* v. *Alexandria,* 341 U.S. 622, 637, note 24, the court cited, in support of its decision that the Commerce clause did not invalidate the ordinance there involved, the case of *Giragi* v. *Moore,* 301 U.S. 670, 81 L. ed. 1334, which was a dismissal for want of a substantial federal question.

The reason why a dismissal of a statutory appeal for want of a substantial federal question has weight as precedent is that such an appeal (unlike certiorari) is a matter of right and dismissal constitutes a holding that the Supreme Court lacks jurisdiction. *Zucht* v. *King,* 260 U.S. 174, 176. See also Rule 12 of the Rules of the Supreme Court of the United States as amended in 1936.

Previously, in the *Whitmore case, supra*[57] a three judge federal court citing the *Fisher's Blend case* had recognized that radio broadcasting is "essentially in part intrastate commerce and in part interstate commerce". The three judge federal court in *KVL v. State Tax Commission,* 12 F. Supp. 497 (D.C.W.D. Wash.) on which appellants rely (Br. 46-49), likewise proceeded on the premise that both intrastate and interstate business are involved, deciding the case on the non-separability doctrine[58] which was repudiated a few months later in so far as taxes measured by gross receipts are concerned.[59] The Hawaii tax is measured by gross receipts.

The other federal cases cited by appellants involve matters of regulation, not taxation;[60] those that are tax cases involve flat license fees imposed indiscriminately on interstate and intrastate commerce and invalid for that reason.[61]

C. The Hawaii tax is, and may be, imposed upon the receipts from intrastate communication. The Hawaii tax[62]

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[57] Point I, p. 7, *supra.*

[58] 12 F. Supp. at p. 501.

[59] *Pacific Telephone and Telegraph Co.* v. *Tax Commission,* 297 U.S. 403, 414-417, discussed *infra,* part G of this point.

[60] That regulatory cases are not in point is developed in part E, *infra.*

[61] So held in *Pacific Telephone and Telegraph Co.* v. *Tax Commission,* discussed *infra,* part G of this point. Such flat license fee cases are *Whitehurst* v. *Grimes,* 21 F. 2d 787 (D.C.E.D. Ky.), *Station WBT* v. *Poulnot,* 46 F. 2d 671 (D.C.E.D. S.C.), and *Tampa Times* v. *Burnett,* 45 F. Supp. 166 (D.C.S.D. Fla.), all cited Br. 46. A somewhat similar state case is *City of Atlanta* v. *Atlanta Journal Co.,* 186 Ga. 734, 198 S.E. 788, to which the Arkansas case cited in note 50 is *contra.*

[62] "*Sec. 5455. Imposition of tax.* There is hereby levied and shall be assessed and collected annually privilege taxes against the persons on account of their business and other activities in this Territory measured by the application of rates against values, gross proceeds of sales or gross income, as the case may be, as follows:

***

D. *Tax upon theaters, amusements, radio broadcasting stations, etc.* Upon every person engaging or continuing within this Territory in the business of operating a theater, opera house, moving picture show, vaudeville, amusement park, dance hall, skating rink, radio broadcasting station or any other place at which amusements are offered to the public, the tax shall be equal to two and one-half per cent of the gross income of the business."

is upon the business of radio broadcasting within the Territory, that is, from stations in the Territory to audiences in the Territory, measured by the gross receipts from intrastate communication between points within the Territory.[63] In both transportation and communication cases[64] it repeatedly has been held that a state may tax the receipts from intrastate transportation or communication, between points within the state, even though the company also is engaged in interstate transportation or communication, between points in the state and points outside the state.

Joseph v. Carter and Weekes Co., 330 U.S. 422 (Br. 57) merely held, as is made clear in *Canton R. Co. v. Rogan,* 340 U.S. 511, 515, that cargo destined to an out-of-state point begins its interstate journey at the water's edge. *Western Livestock Co. v. Bureau of Revenue,* 303 U.S. 250, 259-260 (Br. 29, 30, 56) held that the interstate circulation of a magazine to an out-of-state reading public was not akin to interstate communication. At the same time it reiterated that the radio broadcasting business is comparable to the telegraph and telephone business. The quotation from the case, oft repeated by appellants (Br. 29, 56, 63) that "if broadcasting could be taxed, so also could reception", has no bearing where, as in the present case, the tax is confined to receipts from intrastate communication; the quotation merely explains why receipts from interstate communication may not be taxed.

Spector Motor Co. v. O'Connor, 340 U.S. 602 (Br. 59) involved a company engaged exclusively in interstate trucking. The court expressly held that the company did no intrastate trucking;[65] appellants' statement to the contrary

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[63] *Pacific Express Co.* v. *Seibert,* 142 U.S. 339.

[64] *Pacific Tel. and Tel. Co.* v. *Tax Commission, supra,* 297 U.S. 403 (railroads, telegraph and telephone company); *Ratterman* v. *Western Union,* 127 U.S. 411; *Western Union Telegraph Co.* v. *Alabama State Board,* 132 U.S. 472.

[65] 340 U.S. at pp. 607-608.

ignores the determinative point, namely, that the company was paid for delivering freight to points in other states and did no other business. The significant part of this case is the court's statement that:

> "***where a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying on intrastate business and, within reasonable limits, [citing cases] may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate. *Interstate Pipe Line Co. v. Stone, supra; International Harvester Co. v. Evatt,* 329 U.S. 416; *Atlantic Lumber Co. v. Comm'r of Corporations and Taxation,* 298 U.S. 553****"
>
> (340 U.S. at pp. 609-610.)

Particularly significant is the citation in this connection of the *Interstate Pipe Line Co. case,*[66] which upheld a state tax on the receipts derived from transportation of oil from the oil field to the interstate loading point (the state conceding that it could not tax the further receipts from the loading of the oil for shipment to the out-of-state points designated by the oil companies).

D. **Appellants' station does not occupy the position that the two stations involved in the Fisher's Blend case were stipulated to have.** Appellants ask the Court to rule "as a matter of law" (Br. 48) that the business of its Honolulu radio station today is the same as that which the two radio stations in the State of Washington were stipulated to have in 1935. An ample record in the territorial court demonstrates the opposite. The record presently before this Court is sufficient to dispose of the contention that "as a matter of law" appellants are in the position they seek to occupy. The record here is as follows:

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[66] *Interstate Pipe Line Co.* v. *Stone,* 337 U.S. 662.

Appellants alleged (R. 17, par. XIII) that their "broadcasting is predicated upon a service area extending into various parts of the United States, foreign countries, and on the high seas adjacent to the Territory of Hawaii***" In the exhibits incorporated in appellee's Objections and appellee's Motion for Summary Judgment, appellee demonstrated that appellants' theory as to their service area could not be accepted in any pretrial proceeding and that they could not possibly, as a matter of law, occupy the position the two Washington stations were stipulated to have in the 1935 case. Appellee:

> Produced the F.C.C. Regulations and Standards of Good Engineering Practice showing that a regional station,[67] instead of being designed for effective transmission over an entire zone, as in 1935,[68] under the present F.C.C. regulations "is designed to render service primarily to a metropolitan district and the rural area contiguous thereto". (R. 44-45; 47 C.F.R. Sec. 3.22[c].)
>
> Showed by the F.C.C. Standards of Good Engineering Practice that a Class III-A station[69] is "normally protected to the 2500 uv/m groundwave contour nighttime and the 500 uv/m groundwave contour daytime" (R. 44-45; 47 C.F.R., 1949 edition, p. 120), and produced the map filed by appellants with their applicacation for a F.C.C. license, showing these protected contours (R. 86) which do not even include the whole of the Territory of Hawaii.
>
> Produced F.C.C. computations showing that, according to the F.C.C. standards and graphs, a station such as appellants' is not expected to render satis-

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[67] Appellants' station is on a regional channel (R. 149).

[68] Compare the stipulated facts in the *Fisher's Blend case, supra,* p. 21.

[69] Appellants' station is a Class III-A station (R. 149).

factory service at the distances claimed by appellants (R. 45-47, 84-85, 89-90. Compare R. 120, 122, 124-126, 216-217).

Showed the number of stations assigned to the same frequency as appellants' station (R. 90-91).

Appellee, in moving for summary judgment (R. 141-143), did so under the Johnson Act. Appellee also was of the view (R. 49-50, 142) that by reason of the characteristics of the groundwave and skywave, the daylight programs were indisputably local; that therefore whatever the factual dispute as to the characteristics of distant reception, in any event it was a factual dispute as to the nighttime programs only; that furthermore some programs are of purely local interest; that appellants must fail since they could not sustain their claim of total tax immunity, and had never substantiated a claim to partial tax immunity.[70] But as previously noted the attempt to narrow the factual issues by pretrial procedure was not successful (R. 144-154). A trial has proved to be necessary and it has been had in the territorial court.

The findings in the territorial court demonstrate the impossibility of a court ruling, as a matter of law, that the station here involved is the same as the two Washington stations were stipulated to be in the 1935 case. This station was found to be just the opposite. The findings read in part:[71]

> "1. In so far as places outside the Territory of Hawaii are concerned, KPOA's broadcasts on its standard band do not afford effective or satisfactory service

---

[70] See R. 57, 66, 68-70. *Department of Treasury* v. *Ingram-Richardson Mfg. Co.*, 313 U.S. 252, 255-256. See also *Gorham Mfg. Co.* v. *Tax Commissioner,* 266 U.S. 265, 269-270.

[71] The quoted excerpt is from the findings requested at the conclusion of the trial, prior to argument, and approved by the Circuit Court when it rendered its oral decision.

that measures up to the standards for commercial coverage.

2. Time buyers do not buy time on KPOA as a medium of communication to an out-of-the Territory audience.

3. Where a KPOA broadcast is directed to an out-of-the Territory audience a shortwave relay is used, as in the case of the program 'Hawaii Calls'.

4. The tax has not been assessed on any receipts from broadcasts carried out of the Territory by shortwave relay or brought into the Territory by shortwave relay.

5. During daylight hours enjoyable listening to KPOA's standard band broadcasts is impossible at places outside the Territory, and is limited to ships or planes that happen to be within range.

6. During hours of darkness reception of KPOA's standard band broadcasts outside the Territory is too unreliable and irregular for such reception to have commercial value.

7. KPOA has a 'foreign language department' which is offered by it as a service to advertisers. This department conducts, each broadcast day, a substantial number of hours of broadcasts in Japanese and in a Filipino dialect. These broadcasts are scheduled by the station each day on a participating basis, that is, the station puts on the foreign language programs and sponsors buy spot announcements on the programs.

8. A large number of KPOA time buyers have no desire or occasion to reach any audience outside the Territory, even if effective and satisfactory service were offered.

9. The radio audience outside the Territory of Hawaii is not a factor in the selling or buying of radio time on station KPOA, where no shortwave relay is employed."

E. **The scope of the regulatory authority of the Federal Communications Commission is not the yardstick.** The United States Supreme Court has stated that the demarcation between interstate and intrastate commerce from

the standpoint of regulatory authority is not the same as from the standpoint of taxation. In *Kirschbaum Co. v. Walling,* 316 U.S. 517, 521, the court said:

> "***enterprises subject to federal industrial regulation may nevertheless be taxed by the States without putting an unconstitutional burden on interstate commerce****"

For example, the regulatory power of the Interstate Commerce Commission in the case of railroads is of such scope that the Commission may authorize a railroad to abandon a branch line located wholly with a state and over the protest of that state, as held in *Colorado v. United States,* 271 U.S. 153, and explained in *Pacific Tel. & Tel. Co. v. Tax Commission, supra,* 297 U.S. at p. 412. Yet the right of the state to tax the receipts from intrastate transportation is clear.

Since the regulatory power of Congress under the interstate commerce clause extends to the protection of interstate commerce from interference,[72] the assumption by Congress of control over all radio broadcast stations does not constitute an assertion by Congress that interstate communication is accomplished by every radio broadcast signal; some are merely interfering signals.[73]

Moreover, even where the interstate aspect of a radio broadcast is more than mere interference and accomplishes interstate communication this may or may not be a source of revenue. For example, interstate communications constantly are being accomplished under amateur licenses but this is not a source of revenue. As the tax is measured by gross receipts, interstate communications that are not a source of revenue ipso facto are eliminated from taxation.

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[72] *N.L.R.B.* v. *Pacific Gas and Electric Co.,* 118 F. 2d 780, 786 (C.A. 9th).

[73] See 47 U.S.C. 301 and compare Secs. 153 (b) and (e). See *National Broadcasting Co.* v. *U.S.,* 319 U.S. 190, 210, and see also 35 Ops. Att'y Gen. 126.

No. 12900

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

J. ELROY McCAW and JOHN D. KEATING, *Appellants,* vs. TORKEL WESTLY, The Tax Commissioner of the Territory of Hawaii, *Appellee.*	UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

ADDENDUM TO APPELLEE'S BRIEF

That Congress has not made a radio station a federal instrumentality appears in the Communications Act of 1934, 47 U.S.C. 606 (f). This section specifies that section 606 (c), which empowers the President to regulate or take over the use or control of any radio station in time of war or disaster, shall not be construed to amend, repeal, impair, or affect "existing laws or powers of the States in relation to taxation," except in respect of government communications. The word "States" includes Territories, as provided in section 153 (v).

Dated at Honolulu, T. H., this 22nd day of August, 1952.

Respectfully submitted,

RHODA V. LEWIS
Deputy Attorney General
Attorney for Appellee.

F. Congress has not preempted the field. The argument that Congress has preempted the field to the exclusion of state and territorial taxation (Br. 50, 62) is contrary to the rule that a congressional grant of immunity from state or territorial taxation will not be implied and exists only when granted in plain terms.[74] Appellants' argument is similar to that rejected by this Court when it held that the comprehensive system of congressional regulations for the payment of seamen's wages do not preempt the field to the exclusion of Alaskan tax withholding.[75]

G. Intrastate business need not be separable from interstate commerce; cases of flat license fees must be distinguished. The inseparability of the intrastate communications from interstate commerce is of no significance. The intrastate business may be taxed even though it could not be discontinued without also discontinuing interstate commerce, and so long as the tax is not shown to in fact force the discontinuance of interstate commerce. This was established in *Pacific Tel. & Tel. Co. v. Tax Commission, supra,* 297 U.S. 403, 414-417. The case rules out conjectures (Br. 50) that if the present two and one-half per cent tax were sustained it could be raised to ten per cent; each case is to be dealt with on the facts. The case also is important because it supersedes the decision in the *KVL case, supra,* which had failed to distinguish between flat license fees and taxes measured by receipts. The court said:

> "No decision of this Court lends support to the proposition that an occupation tax upon local business, otherwise valid, must be held void merely because the local and interstate branches are for some reason inseparable. In cases relied upon by appellants there are expressions which may seem to support that

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[74] *Oklahoma Tax Commission* v. *Texas Co.,* 336 U.S. 342, 365-366; *Yerian* v. *Territory,* 130 F. 2d 786, 789-790, aff'g 35 Haw. 855, 875-876.

[75] *Alaska S.S. Co.* v. *Mullaney,* 180 F. 2d 805, 812-814 (C.A. 9th).

contention. But in none of those cases was the challenged tax measured by the gross income of the intrastate business only.***"

(297 U.S. at pp. 415-416.)

"***It is true that in *Sprout v. South Bend,* 277 U.S. 163, 171, the Court, when reciting the essentials of a valid license fee for doing local business, said that it must appear 'that the person taxed could discontinue the intrastate business without withdrawing also from the interstate.' But that statement was made in discussing the validity of a flat bus license fee,***"

(297 U.S. at p. 416.)

"The Telephone Company***makes no claim that the tax laid upon it in fact burdens interstate commerce. Nor could it do so. ***Not only is the intrastate business (even with the addition of this tax) no burden; it is that branch of the business which makes it financially possible to carry on the interstate."

(297 U.S. at p. 417.)

H. **The holding of a federal license is not material.** It is not material that the federal government issues a license to the station, for the license does not convert KPOA into a federal instrumentality or confer immunity from state taxation.[76] A radio station does not resemble a national bank.[77]

CONCLUSION

This appeal cannot resolve the merits of the litigation. There is a narrow issue as to whether the action rightly

[76] *Federal Compress Co.* v. *McLean,* 291 U.S. 17, 22; *Broad River Power Co.* v. *Query,* 288 U.S. 178, 180.

[77] The distinguishing characteristic of a national bank is that it is a public corporation chartered by the United States to act as its agent. *Osborn* v. *Bank of United States,* 9 Wheat. 738, 859-860; *McCulloch* v. *Maryland,* 4 Wheat. 316. That a radio station does not resemble a national bank is the inevitable result of the holding in *Whitmore* v. *Ormsbee, supra,* 329 U.S. 668, aff'g 64 F. Supp. 911, 916-917; as a further point in the *Whitmore* case it was held that a radio station must qualify under state laws, the Supreme Court citing on this point *Union Brokerage Co.* v. *Jensen,* 322 U.S. 202.

was dismissed under the Johnson Act and the policy therein set forth, or whether it should have been held awaiting the outcome of litigation in the territorial courts under the rule of *Spector Motor Co. v. McLaughlin, supra.* Since the dismissal was without prejudice nothing of substance is involved; moreover the Court was correct in applying the Johnson Act and its policy.

While appellee submits that an affirmance is in order, the precedent of *Georgia Railroad and Banking Co. v. Redwine, supra,* might be applied to defer disposition of this case pending final disposition of the similar litigation in the territorial courts.

DATED at Honolulu, T. H., this 9th day of April, 1952.

Respectfully submitted.

RHODA V. LEWIS
Deputy Attorney General
Attorney for Appellee.

No. 12900

United States Court of Appeals

For the Ninth Circuit

J. ELROY MCCAW & JOHN D. KEATING, *Appellants,*

— VS. —

TORKEL WESTLY, THE TAX COMMISSIONER OF THE TERRITORY OF HAWAII, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

REPLY BRIEF OF APPELLANTS

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THE ARGUS PRESS, SEATTLE

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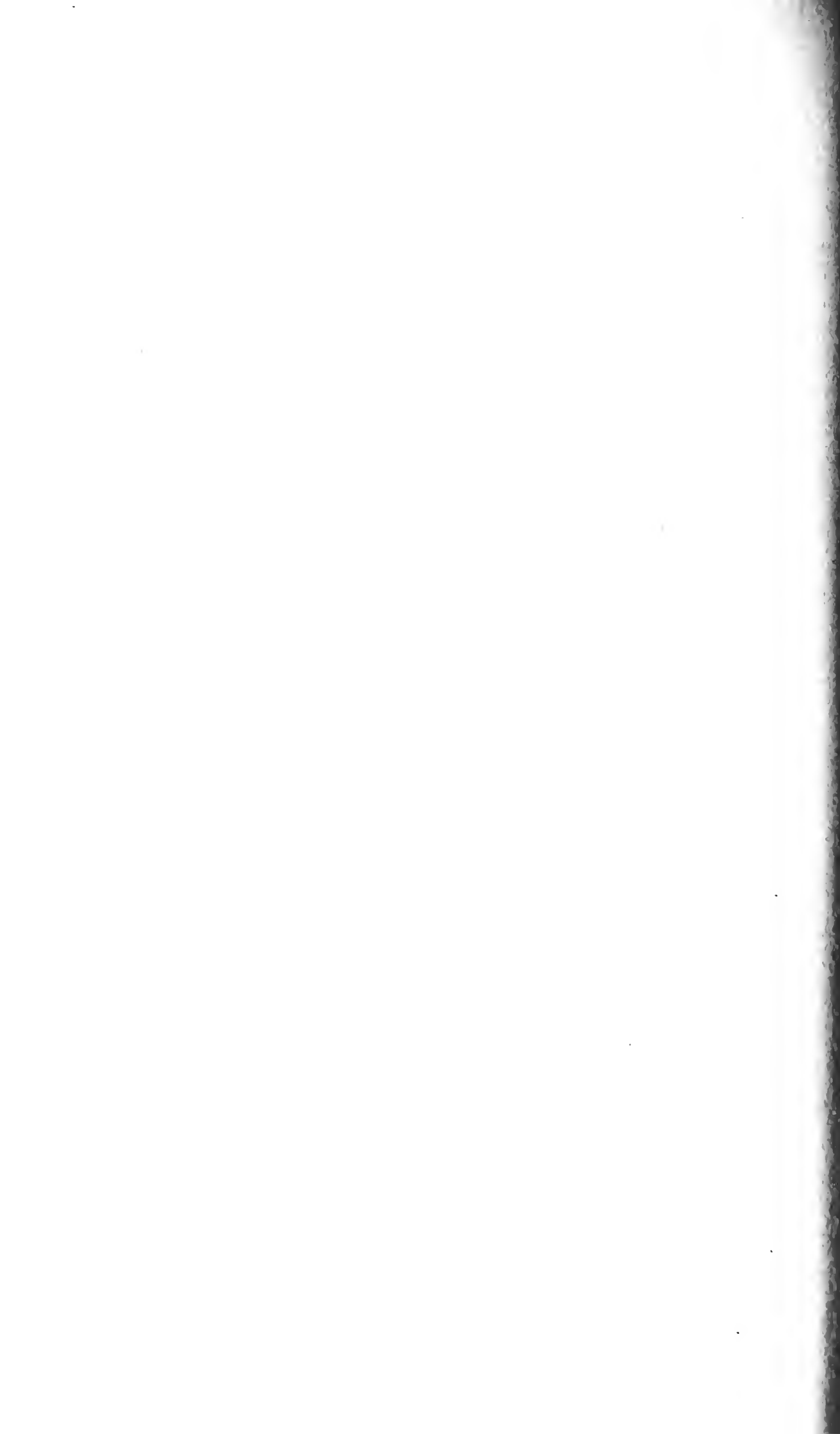

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

REPLY BRIEF OF APPELLANTS

I.

The statement by Appellee on Page 8 of its brief that Appellants theorized "by letting their time for appeal expire, they (Appellants), excused themselves from resorting to territorial courts" is a double-edged accusation. Appellee's exhibits on Pages 61, 62, 65, and 68 of the transcript show a continuous correspondence was indulged in between Appellee and Appellants (who are *not* lawyers) anent the illegality of this radio tax law. This debate ran from February 1, 1948, to August 11, 1950 (Tr. 61). Appellants had no more duty to start a lawsuit than did Appellee. Appellant had a right to believe that Appellee would not attempt to enforce an illegal law against them, especially, since the Fishers Blend and KVL cases so decided. On August 11, 1950, the Attorney General of Hawaii rendered an opinion

upholding this law (Tr. 59), after "dillydallying" for more than two years, as to whether they would or would not enforce this law.

Therefore, Appellants had a right to believe from this "running correspondence" that no suit was necessary until after the Attorney General's opinion of August 11, 1950 (Tr. 59). The right of appeal had expired during this correspondence. Laymen (Appellants) were conducting this correspondence on behalf of Appellants, not lawyers. Should the Appellants now be deprived of federal jurisdiction simply because they were unwary and their time to appeal expired in the territorial court, because of correspondence conducted by both parties in good faith? Thus, Appellee's statement that Appellants theorize "By letting their time for appeal expire, they excused themselves from resorting to territorial courts," is as unfounded as would be an accusation by Appellants that Appellee trapped Appellants (laymen, not lawyers) into so doing. When the writer of this brief was employed in the case, he simply asked sixty more days to prepare a suit (in August, 1950) after more than two years had already gone by with correspondence about the law.

II.

Section 1575, Hawaiian Laws, cited on Page 11 of Appellee's brief which has to do with the subsequent suit filed by Appellant in the Territorial Court, whereby payment is made to the Territory under protest, must be interpreted in the light of later Sections 5535 and 5219, Hawaiian Laws, when it comes to the point of "paying back" the money paid under protest, there-

fore Section 1575 by itself is no remedy at all. (See Appellants' Brief, Page 10.) One can "pay" under Section 1575, but the remedy of "return" is governed by Sections 5535 and 5219, which are not remedies at all, but "snares."

III.

As a service to this court Appellants are incorporating as an Appendix to this Reply Brief the decision of the Territorial Circuit Court in the action initiated by these Appellants, under coercion, after the District Court of the U.S. refused to grant the relief prayed for in this action. Likewise attached is the more polished "decision" of the Attorney General of the Territory of Hawaii.

Both of these "decisions" fall into the same error, namely, their voluminous research for detail, with which to sustain their erroneous "decisions," overwhelmed simple consideration of the plain statutes of the United States, and patently ignored prior decisions of the Supreme Court of the United States dealing with this subject matter.

The strength of a radio signal, licensed by the Federal Communications Commission, has utterly no bearing whatsoever upon the question of whether or not radio is or is not intrinsically engaged in interstate commerce to the unconcern of a state or territory. And, there cannot be any unlicensed radio station, no matter its power rating, in the United States or its Territories. Section 301, USCA, Title 47, was glossed over and ignored. We quote it:

"Section 301. *License for radio communication or transmission of energy.*

"It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) *from one place in any Territory* or possession of the United States or in the District of Columbia *to another place in the same Territory,* possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) *from any place in any State, Territory, or possession of the United States,* or in the District of Columbia, to any place in any foreign country or *to any vessel;* or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the

United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter. (June 19, 1934, c. 652, Sec. 301, 48 Stat. 1081.)" (Italics ours.)

This court will note that Congress specifically included in the Communications Act an emmination "from one place in any territory (Honolulu where KPOA is situated) . . . to another place in the same territory" (another place in Honolulu). This court will likewise note that not only is this case covered by Subsection A above, but by Subsection C, which covers an emmination "from any place in any territory . . . *to any vessel.*"

Congress did not say whether the vessel was to be at sea or in the harbor at Honolulu, but only "to any vessel."

Therefore, the Appellee's concern about how far KPOA's emminations reach is specious as a matter of law. This court will judicially note from the exhibits and from its own knowledge of radio that even a taxicab radio emmination can be heard beyond the three-mile limit, and they also have to be licensed by the Federal Communications Commission. The Supreme Court as early as 1943 in the case of *National Broadcasting Company v. United States* (63 S.Ct. 997, 319 U.S. 190) closed all other points in this case against Appellee as a matter of law in the celebrated "chain broadcasting decision" when the Court rendered an extended opinion on radio and on its practical aspects:

"The plight into which radio fell prior to 1927 was attributable to certain basic facts about radio

as a means of communication—its facilities are limited; they are not available to all who may wish to use them; the radio spectrum simply is not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate without interfering with one another. Regulation of radio was therefore as vital to its development as traffic control was to the development of the automobile. In enacting the Radio Act of 1927, the first comprehensive scheme of control over radio communications, Congress acted upon the knowledge that if the potentialities of radio were not to be wasted, regulation was essential * * *

"As we noted in *Federal Communications Commission v. Pottsville Broadcasting Co.,* 309 U.S. 134, 137, 60 S.Ct. 437, 438, 84 L.ed. 656, 'In its essentials the Communications Act of 1934 (so far as its provisions relating to radio are concerned) derives from the Federal Radio Act of 1927 . . . By this Act Congress, in order to protect the national interest involved in the new and far-reaching science of broadcasting, *formulated a unified and comprehensive regulatory system for the industry.* The common factors in the administration of the various statutes by which Congress had supervised the different modes of communication led to the creation, in the Act of 1934, of the Communications Commission. But the objectives of the legislation have remained substantially unaltered since 1927 * * * '

"The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are asked to regard the Commission as a kind of traffic officer, policing the

wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission * * *

"The Commission's licensing function cannot be discharged, therefore, merely by finding that there are no technological objections to the granting of a license. If the criterion of 'public interest' were limited to such matters, how could the Commission choose between two applicants for the same facilities, each of whom is financially and technically qualified to operate a station? Since the very inception of federal regulation by radio, comparative considerations as to the services to be rendered have governed the application of the standard of 'public interest, convenience, or necessity.' See *Federal Communications Commission v. Pottsville Broadcasting Co.,* 309 U.S. 134, 138 n. 2, 60 S.Ct. 437, 439, 84 L.ed. 656.

"The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio * * *

"These provisions, individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the 'larger and more effective use of radio in the public interest.' We

cannot find in the Act any such restriction of the Commission's authority. *Suppose, for example, that a community can, because of physical limitations, be assigned only two stations. That community might be deprived of effective service in any one of several ways. More powerful stations in nearby cities might blanket out the signals of the local stations so that they could not be heard at all. The stations might interfere with each other so that neither could be clearly heard. One station might dominate the other with the power of its signal. But the community could be deprived of good radio service in ways less crude. One man, financially and technically qualified, might apply for and obtain the licenses of both stations and present a single service over the two stations, thus wasting a frequency otherwise available to the area.* The language of the Act does not withdraw such a situation from the licensing and regulatory powers of the Commission, and there is no evidence that Congress did not mean its broad language to carry the authority it expresses.

"A procedural point calls for just a word. The District Court, by granting the Government's motion for summary judgment, disposed of the case upon the pleadings and upon the record made before the Commission. The court below correctly held that its inquiry was limited to review of the evidence before the Commission. Trial *de novo* of the matters heard by the Commission and dealt with in its Report would have been improper. See *Tagg Bros. v. United States,* 280 U.S. 420, 50 S.Ct. 220, 74 L.ed. 524; *Acker v. United States,* 298 U.S. 426, 56 S.Ct. 824, 80 L.ed. 1257." (Italics ours.)

Thus, the U.S. Supreme Court pointed out "several ways" in which the strength of Appellants' signal

would be immaterial as to whether it is solely engaged in interstate commerce to the exclusion of a state's concern. A small powered station in Honolulu could be "blanketed out" by "more powerful stations" or "the stations might interfere with each other," the Supreme Court said, illustrating the need for a uniform and national scheme for the regulation of radio — and also, since — low powered stations could be destroyed by larger ones miles away, illustrates that the rated power of a station does not make it less amenable to the sensitive scheme Congress created for its regulation.

IV.

This court in the case of *Anderson v. Mullaney,* 191 F.2d 123, defined the elements of interstate commerce in the fishing industry, particularly as concerns "the local activity inherent in any form of interstate commerce." As this court said in that case, "there are always convenient local incidents in every interstate operation." Any local activity of Appellants, from writing copy, soliciting advertising, fixing and adjusting its transmitter and equipment, employment of licensed operators (By the FCC), its location of its studios, are all associated and assembled for the single and sole purpose of effectuating Appellants' final act of its commerce—the projection of a radio signal into space—and thus into interstate and even international commerce. That is the final act of radio broadcasting, namely, the projection of its radio signal into space and beyond recall to unknown receivers, even "from one place in any territory to another place in the same territory" (A of Section 301, *supra*) *or* "from any

place in any territory—to any vessel'' (C of Section 301, *supra*), or to other points around the world.

Section 303, Title 47, USCA, from Subsections A to Q, respectively, show the extent and sensitivity of the pre-emption by Congress of the radio field. The sensitivity of the regulation is the test of whether a subject matter has been pre-empted.

Appellants also refer this court to Section 153, Title 47, USCA, Subsection B as follows:

> ''Section 153. Definitions.
>
> ''For the purposes of this chapter, unless the context otherwise requires—
>
> ''(a) 'Wire communication' or 'communication by wire' means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, *and services* (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.
>
> ''(b) 'Radio communication' or 'communication by radio' means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all *instrumentalities, facilities,* apparatus, *and services* (among other things, the receipt, forwarding, and delivery of communications) *incidental* to such transmission. (Italics ours.)
>
> ''(d) 'Transmission of energy by radio' or '*radio transmission of energy*' includes both such transmission and all instrumentalities, facilities, *and services incidental* to such transmission.
>
> ''(k) 'Radio station' or 'station' means a station

> equipped to engage in radio communication or *radio transmission of energy.*" (Italics ours.)

Thus, all local "services," or "local activities" or "incidentals," or "instrumentalities," of any kind by a radio station is included within the "Definitions" of the Communications Act.

As stated in *Dumont Lab. v. Carroll,* 86 F. Supp. 813 (page 61, Appellants' Brief) "the field of radio broadcasting has been pre-empted by Congress."

The *Alaska Fishing* case, *supra,* decided by this court and affirmed by the Supreme Court in the 72 S.Ct. 48, affirms the principle that a tax cannot be sustained by simply "tying it to a local incident."

V.

Appellee's argument that this action should be dismissed, or held up pending the arrival of the local suit into which Appellants were coerced, runs counter to one of Justice Frankfurter's statements in 72 S.Ct. 430, in the case of *Mullaney v. Anderson* wherein the court stated:

> "To dismiss the petition and require the Plaintiffs to start over in the District Court would entail needless waste and run counter to effective judicial administration * * * "

The complaint in the subsequent local suit, into which Appellants were coerced, is admitted by Appellees on Page 5 of their brief to be identical with the one at bar. Appellee said:

> "When that case reaches this court the record will show that the complaint in the territorial court is practically the same as the complaint in the court below" (in this case).

It is identical with the complaint in this cause of action. The issues are the same; the parties are the same. No new matter is involved. It is a needless waste of time and expense to await the mere satisfaction of a doubtful form of procedure which does not apply to this case anyway, to be satisfied before justice can be obtained in the cause at bar. This court has the right to do substantial justice to the parties in the present hearing even though unresolved problems of first instance are involved. It was not Appellants' fault that the problems were not resolved. Appellate courts not only correct lower courts but in the interest of effective judicial administration, they render effective judgments.

In the case of *Guardian Life Insurance Company v. Kortz,* 151 F.(2d) 582, it was held that the pendency of actions by the insured in a state court to recover unpaid disability benefits did not give that court exclusive jurisdiction of the subject matter of actions for declaratory judgments instituted by the insurer in a Federal District Court, in which actions the insurer sought to be relieved of both past and future liability for disability benefits. The court stated:

> "It is well settled that where two actions involving the same cause of action are pending in a state and a federal court, and are within the concurrent jurisdiction of each, both actions, in so far as they seek relief in personam, may proceed at the same time and when one action has gone to final judgment, that judgment may be set up as a bar in the other action under the doctrine of *res judicata.*"
>
> "Counsel for Kortz assert that the Insurance Company can present the issues raised by the com-

plaints for declaratory judgments by cross-petitions in the state court actions. On the other hand, counsel for the Insurance Company asserts that as the issues are framed in the state court the cases may be disposed of upon the issue of disability without a determination of the issues raised by the complaints for declaratory judgments; that there can be no substantial dispute as to the facts in the actions for declaratory judgments; and that the issue of law presented therein can be more expeditiously and inexpensively determined in such actions."

"It is the duty of the federal court, in exercising its jurisdiction under Sec. 274d, *supra,* to ascertain whether the questions in controversy between the parties to the federal court suit can better be settled in the proceedings pending in the state court."

"The question should be resolved by a determination of whether there is such a plain, adequate, and speedy remedy afforded the Insurance Company in the pending state court actions that a declaratory judgment will serve no useful purpose."

"The fact that questions of state law are presented will not, in the absence of exceptional circumstances, justify a refusal to entertain an action for a declaratory judgment. In *Meredith v. Winter Haven,* 320 U.S. 228, 234; 64 S.Ct. 7, 11; 88 L.Ed. 9, the court said:

"The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts. In the absence of

some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non-exercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment."

"An action for a declaratory judgment, if otherwise appropriate, should not be dismissed merely on the ground that another remedy is available, nor because of the pendency of another suit, if the issues in the declaratory judgment actions will not necessarily be determined in that suit."

"Rule 57 of the Federal Rules of Civil Procedure for the District Courts of the United States, 28 USCA, following section 723c, in part, provides:

"The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."

The foregoing case has been followed by *Skelly Oil v. Phillips Petroleum,* 174 F.(2d) 89, where a Federal Act was involved.

Those cases holding to the contrary are where no federal statute is involved as in this case.

State laws are not controlling in determining what the incidents of federal rights shall be.

An interpretation by a Federal Court of a right or immunity created by a law of the United States (Title 47, USCA) is an essential element in this cause of action. If the Communications Act has foreclosed the

rights of states to legislate on this subject matter, then a declaration by a Federal Court should issue to that effect. The court below admitted a more "speedy" remedy existed in Federal Court (Tr. 313). That, with the jurisdictional elements obtaining, was controlling.

In the case of *Dice v. Akron,* 72 S.Ct. 312, the Supreme Court stated:

> "First. We agree with the Court of Appeals of Summit County, Ohio, and the dissenting judge in the Ohio Supreme Court and hold that validity of releases under the Federal Employers' Liability Act *raises a federal question to be determined by federal rather than state law.* Congress in Section 51 of the Act granted petitioner a right to recover against his employer for damages negligently inflicted. State laws are not controlling in determining what the incidents of this federal right shall be. *Chesapeake & Ohio R. Co. v. Kuhn,* 284 U.S. 44, 52 S.Ct. 45, 76 L.ed. 157; *Ricketts v. Pennsylvania R. Co.* (2 Cir.) 153 F.(2d) 757, 759, 164 A.L.R. 387. Manifestly the federal rights affording relief to injured railroad employees under a federally declared standard could be defeated if states were permitted to have the final say as to what defenses could and could not be properly interposed to suits under the Act. Moreover, only if federal law controls can the federal Acts be given that uniform application throughout the country essential to effectuate its purposes. See *Garrett v. Moore-McCormack Co.,* 317 U.S. 239, 244, 63 S.Ct. 246, 250, 87 L.ed. 239, and cases there cited. Releases and other devices designed to liquidate or defeat injured employees' claims play an important part in the federal Act's administration. Compare *Duncan v. Thompson,* 315 U.S. 1, 61 S.Ct.

422, 86 L.ed. 575. Their validity is but one of the many interrelated questions that must constantly be determined in these cases according to a uniform federal law" (Italics ours).

These cases illustrate that the States and Territories cannot do *directly* what the Territory (Appellee) is trying to do *indirectly* in this case, namely: interpret the extent of appellant's "right" or "immunity" under a Federal law. Appellants are entitled to a Federal Court interpretation of their Federal rights.

Again the Supreme Court stated in *First National Bank of Chicago v. United Airlines,* 72 S.Ct. 421,

> "Whether or not Illinois may validly close her own courts to litigation of this kind, Illinois most assuredly cannot prescribe the subject matter jurisdiction of federal courts even when they sit in that State. Congress already has done this, 28 U.S.C. Sec. 1332(a) (1), 28 U.S.C.A. Sec. 1332 (a) (1), and state law is powerless to enlarge, vary, or limit this requirement. The parties to this case have showed the diversity of citizenship and amount in controversy required by Congress, and therefore the federal court, *by virtue of the law of its own being,* has jurisdiction of their action.
>
> "The suggestion that *Erie R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.ed. 1188, and its progeny diminish the jurisdiction of a federal court sitting in a diversity case by assimilating any limitation that the state may impose on her own courts seems to confuse the law of jurisdiction with substantive law.
>
> "It is indeed fanciful to suggest that a state statute relating to the power of its own courts is an applicable 'rule of decision' under this statute,

when Congress in passing the federal jurisdictional grant has specifically 'otherwise required and provided.' 28 U.S.C. Sec. 1332(a) (1), 28 U.S.C.A. Sec. 1332(a) (1), 28 U.S.C.A. Sec. 1332 (a) (1). The petitioner enters the federal court not by the grace of the laws of Illinois but by the grace of the laws of the United States." (Italics ours.)

In the case of *Memphis Steam Laundry Cleaner, Inc. v. Stone,* 72 S.Ct. 424, the court said:

"In passing upon the validity of a state tax challenged under the Commerce Clause, we first look to the 'operating incidence' of the tax. The Mississippi Act requires a 'privilege license' and imposes a 'privilege tax' upon appellant's employees 'soliciting business.' The Mississippi Supreme Court described the tax as follows: 'The tax involved here is not a tax on interstate business for a laundry not licensed in this state, a local activity which applies to residents and non-residents alike."

"The State may determine for itself the operating incidence of its tax. But it is for this court to determine whether the tax, as construed by the highest court of the State, is or is not 'a tax on interstate commerce'."

In the case of *Mott v. City of Flora,* 3 F.R.D. 233 (234), on a motion to dismiss a complaint on the grounds that the remedy lay in the state courts the Federal court said,

"As was pointed out at the pre-trial hearing, if the court must refuse to take this case, it would, if consistent, *be compelled to refuse all cases in which the constitutionality of a state statute is in anywise brought in question unless the constitutionality of*

> *that particular statute had been passed upon and authoritatively settled by the state courts. It would not appear that it was the purpose of the United States Supreme Court, in the decisions relied upon by the defendant, to go to this length in limiting the jurisdiction or the discretion of the district courts.*" (Italics ours.)

The ruling in this case was followed in the case of *City of Birmingham v. Monk,* 185 F.2d 859.

In the recent case of *Redditt v. Hale,* 184 F.2d 443 (CCA, Ill.) the court held:

> "THOMAS, Circuit Judge.
>
> "This is an appeal by plaintiffs from an order sustaining a motion of defendants to dismiss the complaint for want of jurisdiction. Jurisdiction was predicated upon diversity of citizenship and a demand for judgment in the amount of $142,200.
>
> "The motion to dismiss alleges want of jurisdiction on the ground 'that the subject matter of this litigation is now in the jurisdiction of the Probate Court of Crittenden County, Arkansas.'
>
> "(1) that the cause of action alleged in the complaint is exclusively within the jurisdiction of the probate court of Crittenden County, Arkansas, and (2) that this suit is barred because there is 'another action pending' in the probate court of Crittenden County, Arkansas, involving the same parties and the same cause of action. * * *"
>
> "* * * 'the pendency in a state court of an action brought by the plaintiff in a subsequent action between the same parties in the federal court, and which involves the same subject matter, presents no bar and furnishes no ground for the abatement of the later action."

CONCLUSION

The court below admitted that a more speedy remedy existed is the U.S. District Court (Tr. 313). Even if the Johnson Act applied, which it does not, just any kind of a remedy in a state, let alone a territory, does not make it applicable unless the remedy could be said to be an efficient one. The lower court admitted the remedy in the Federal Court was more speedy, and thus more efficient. All the essential elements of jurisdiction were present (Tr. 467). There was a conflict between high federal and state courts on a point of law involving a right or immunity arising out of a federal law to appellants. Judicial discretion cannot be unfettered. As a matter of law, and in view of the many U.S. Supreme Court's decisions on the sensitivity of the regulations of the Federal Communications Act, summary judgment, especially *where both parties asked for the same,* could have disposed of this matter—one way or the other.

The Territory has had its day in a Territorial court (see Appendix). Nothing new was added to the pleadings of the Appellants in the Territorial court from what was advanced in the U. S. Court. The Appellee had a specious "field day," so to speak, on its single immaterial point, namely, "How far can Appellants' signal be heard?" As a matter of law, Radio cannot be "half free" and "half taxed." It's "all or none." Otherwise, chaos would again result instead of effective regulation.

An examination of the Appendix herein will show that a deferment of decisive action in this case will

again merely extend the argument more extensively into one of an immaterial and specious nature, namely, "How far can Appellant's signal be heard?" That argument has utterly no moment in this case in view of the statute expressly including Appellant's business, even though its signal can be heard only "within the Territory" or by "any vessel."

A deferment of this action until the local Territorial case comes up to this court will likewise merely add to Appellants' woes and put off until another day, so to speak, a question that will inevitably have to be answered, namely, is the tax law good or bad?

Respectfully submitted,

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APPENDIX I.

Law No. 21340

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, TERRITORY OF HAWAII

AT TERM **IN LAW**

J. Elroy McCaw and John D. Keating,
Complainants,
v.
The Tax Commissioner of The Territory of Hawaii, Torkel Westly,
Defendant.

No. 21340

Action to Recover Excise Taxes Paid Under Protest

DECISION

(The Clerk called the case at 11:00 a.m.)

The Clerk: For decision.

The Court: Gentlemen, this is an action by the complainants, McCaw and Keating, to recover gross income taxes levied against their receipts or a portion of their receipts from broadcasting, receipts which were paid under protest, together with some interest and penalties.

The Territory, in responding to the action, has in addition to denying the allegations of the complaint have cross-complained for the amount which was alleged to be due in addition to the amount herein sued for.

The complainants operate a broadcasting station here in the City of Honolulu, commonly known as Station KPOA, on a wave band of 630 kilocycles with 5,-

000 watts of power. The business in which they are engaged is one which is controlled and regulated in a very great degree by the Federal Communications Commission. It is the contention of the complainants that because of the preemption of this field of endeavor by the Federal Communications Commission that any state or territory, and of course in this case, the Territory of Hawaii, has not the right or the power to impose this tax as the regulation of such a business has been preempted and therefore that they are precluded.

Now, the Federal Communications Commission has defined what is an interstate communication. That is Section 3 of the Communications Act of 1934, it being subsection (e), which says, "An interstate communication or transmission means a communication or transmission from any state or territory," and then, leaving out the various things that are not important, "to any other state or territory." And, of course, there has to be a license for any radio station, as provided by Section 301 of the Act, where there is any apparatus operated for the transmission of energy or communication by signals, by radio, from one place in any territory to another place in the same territory or within states or between a state and a foreign country, and things of that kind. So, that particular section just quoted really means that it takes in all forms of radio communication, no matter what they are, whether they be transmission between states or between a station and points right here in Honolulu, or between taxicabs or any sort of a communication of that kind. The only thing that I understand is excluded from the Act is the governmental transmission.

It has been held in a number of cases upon which the complainants assert their position that radio broadcasting by the very nature of that industry, or whatever we may term it, is in the field of interstate commerce for the reason that once the radio impulse or waves, or whatever you want to call them, are put in motion by broadcasting apparatus that there is no longer any control over the transmission of that signal. And, of course, on the mainland, where state boundaries are very close, it is impossible to say in many instances that it is not interstate commerce. Examples have been referred to, such as a radio station in Spokane or Coeur d'Alene, a radio station in El Paso, near the Mexican border, a radio station at Yuma, between California and the Arizona border, and you could make any number of such examples.

It is further contended by the complainants that this tax is a burden upon interstate commerce, in which this radio is engaged, and therefore an undue interference with interstate commerce, and therefore that the tax is void.

It is contended, on the other hand, by the Territory that KPOA, when we start to analyze its business and the field in which or the area in which it is involved, that we can go to the licensing and the regulations of the Federal Communications Commission and to a great extent find our answer.

Now, KPOA, it has been testified, is without question a station of the 3-A class of radio stations. Such a station is one which operates with power of not less than one kilowatt nor more than five kilowatts and the

service area of which is subject to interference in accordance with the engineering standards of allocation. And then, Section 3.30 of the Communications Act provides that such station, "Each standard broadcasting station will be licensed to serve primarily a particular city, town, or other political subdivision, which will be specified in the station's license, and the station will be considered as located in that place." And subsection (c) of that, "The transmitter of each standard broadcast station shall be so located that the primary service is delivered to the borough or city in which the main studio is located, in accordance with the standards of good engineering practice."

There must be in ordinary broadcasting three service areas. They have been defined by the Federal Communications Commission as follows: "The term 'primary service area of a broadcasting station' means the area in which the ground wave is not subject to objectionable interference or objectionable fading." Under that particular classification it has been testified in this case that during the daytime hours KPOA does its broadcasting by the means of the ground wave and that this ground wave reaches the entire group of the Hawaiian Islands, with two exceptions. However, we may say two major exceptions. One is an area on the northern part of Kauai, just back of the mountains that we know as Kokee, or the Canyon; the other is that area south of the high mountains on the Island of Hawaii and includes the city of Hilo. And it might be well to note at this particular place that this station, as well as another broadcasting station located here in Hono-

lulu, each has a subsidiary or connected station located in the city of Hilo. The secondary area of a broadcasting station means the area served by the sky wave and not subject to objectionable interference. The signal is subject to intermittent variations in intensity.

It has been testified in this case that at night the signals by the radio broadcasting are sent out to a great extent through a sky wave or sky waves and at night these sky waves, as the Court understands them, goes up a ways and hits something, bounces back and hits the earth or water and then back again, and these going back and forth reach out and under certain phenomena can be heard in almost any place on earth.

But the question for this Court to decide in that particular category is, what is the area in which the sky waves are of such intensity and are capable of being, we may say, pleasurably heard by a listening audience — we may put it this way — to be of commercial value to a radio station that is in business with the exception of 30% of its time which may be allotted to programs from which he can, if he can find sponsors, get remuneration for the operation of that station.

There is a third area of service and it is defined as the area, the intermittent service area of a broadcasting station, means the area serviced from the ground wave but beyond the primary service area, subject to some interference or fading.

There have been a lot of technical terms used here. I hope I don't make a mistake in the use of them, but this Court, hearing this case, of course this Court has the first chance of making the mistake, if I do make the

mistake. I don't feel that I am too much to be blamed because this is something I never heard of before in my life. It seems to me, as I understand the ground wave, that there is .5, approximately .5 of a microvolt per meter is the area, or something of that kind, wherein there is supposed to be proper listening, and you go on from there out until you get less and less. I think I had that down here some place, but the attorneys know what I mean anyway; they understand what I am talking about.

In this case there have been letters, what they call D-X letters, that have been received. These letters fall in the category, as I understand it, of people that have a hobby to a great extent of listening to stations and picking up signals, and a lot of them have a regular form letter that they send in, and one of the things they seem to be interested in is to get an acknowledgment to put in their albums or collection, or whatever it is. So that these D-Xer letters have come from a great many places. I believe, if my memory serves me correctly, there was one received from some place in Massachusetts, there was one received from some place in Australia, a number from New Zealand, Samoa, and various places in the Pacific, and of course a number of other places on the mainland. It is my recollection also that this reception or hearing of this station were all received via the route of the sky wave as contradistinguished from the ground wave. There is an exception of one instance, in which there was some testimony that on the battleship Iowa, I think it was, that somebody heard a ground wave on one of the radio receiving stations on board that vessel, some 1,500 miles

out to sea. One of the engineers, the engineer for the Territory, said it was possible but it was an exception, that generally speaking the volume of the ground wave at that distance in the daytime was, as I understood what they were endeavoring to state, that when the ground wave gets down so it is weak enough, then it is drowned out and it doesn't become listenable because of ground noises.

So that this Court, after listening to this evidence, and in its ordinary, simple terms, I am not endeavoring to get into the field or to use the language of the gentlemen who have been on the stand because I would just get myself tied up in knots, I believe that the evidence here shows that the ground waves certainly, or the daytime broadcast is incapable, so far as any commercial value for constant listening, is confined to the Hawaiian Islands; that the sky wave at night for commercial purposes, I believe, is also limited to the Hawaiian Islands. That is, for dependability.

Now, it seems that in radio that the hours of the day, the seasons of the year, vary, the ability to receive these broadcast signals so that at certain seasons of the year signals can be very plainly heard in Alaska, certain seasons of the year they can be heard south, and if the channel through which they travel is in darkness, then that aids in its reception.

There has been introduced into evidence a great many articles from magazines, advertising radio coverage, also brochures, so-called, that this station and other stations here in the Territory have put out, I understand for the purpose of advising their prospective

sponsors or persons buying radio time, that the map or chart, to a great extent, exhibited or attached to such an article, is the coverage or the area that the radio selling the time is covered. In each of those instances here in Hawaii, they have not gone beyond the Territorial limits of the Territory of Hawaii, that is, for local broadcasting. I am talking about the ordinary broadcaster's band and not the short-wave band.

There has been testimony that in one instance a gentleman from Samoa, who I understand is now in Durance Vile, purchased some time to broadcast a program to Samoa, and it was broadcast, as I recall the testimony, at an hour in the wintertime, in December, as I recall, when the sky wave would be used at night to deliver the program to Samoa.

There is evidence in this case that a request has been made of these complainants to produce any sponsor who has purchased commercial time on their broadcasts with an end in view of sending advertising to any radio audience other than that located within the Territory of Hawaii; that there has been no showing of any such thing, with the exception of this one Samoan program, if you can call that one.

Now. we come down to reality—what does this broadcast company make its money out of? With the exception of short-wave relays such as baseball games, fights, football games, various programs such as Hawaii Calls, and that sort of thing, which is either sent or received by short-wave to or from the mainland, as the case may be, their broadcasting, in the Court's mind, is confined to the Territory of Hawaii and they make their money

with Hawaiian audiences in view and not the audience outside the Territory.

Let's go into these various cases, or let's say these various lines of cases that have been ably argued before the Court. We take first the stevedoring cases. There have been attempts in various courts of the United States to tax stevedoring companies on the receipts that they have made from loading and unloading steamships. It has been apparently uniformly held that that is an interference with interstate commerce, the reasoning being that when you put cargo on a vessel it is going either to a foreign port or to another state, and they have held that the interstate transportation of that cargo starts when the sling or when you put the cargo in the sling to put it on the ship and it is not completed until it is taken off the sling and put on the dock at its destination.

Now, another line of cases is the railroad cases. We have a great many trans-continental railroads and many of them that involve a number of states. It seems to be the universal holding that a railroad system is so intricate in its nature that you cannot tax it because you cannot segregate the services, so that it is more or less custom, and of course, we have our steamship fares, our airplane fares, and things of that kind, which are within interstate commerce.

There has also been brought to the attention of this Court a number of cases, what they commonly call trucking cases, and where it has been shown that the trucking was solely of an interstate nature, then the states have been prohibited from interfering with that

or with taxing its proceeds. However, it has been held in one case of a belt-line railroad, where it picks up freight cars from freight yards of various railroads and takes them to the docks in a city, that is where it is wholly within the city area, and that is the only business of the belt railroad, that that is intra-state commerce and subject to taxation.

If this station were so situated that the reception of its programs in another state or territory was sufficiently constant so as to be of commercial value, this Court would without hesitation find that this was an interstate enterprise.

There have been a number of cases which Mr. Davis, able counsel for the stations, has brought to the Court's attention, particularly in the State of Washington, the leading case being what has been referred to here as the *Fisher's Blend* case. That case went to the Supreme Court of the United States and Mr. Justice Stone, I believe, made a finding that the radio field was interstate in its nature. But in that particular case the facts which were furnished the court, there was a stipulated set of facts that went to the Supreme Court, upon which we must consider is the basis of their decision, and it was that this station was engaged in broadcasting on a clear channel, not only interstate but international, and that it received money for that sort of broadcasting. So that, under the stipulated facts the Court could make no other finding. Then there are other Washington cases of a similar nature that have found to the same effect.

There is a case that has been referred to as the Albu-

querque case, where the station was located in Albuquerque and a tax of this kind was sustained down there on the basis that that station only served a particular area and that particular area was within the state, and they excepted, if my memory serves me right, any programs over that station that were broadcast through a media coming from outside the state, or in that particular case, where they have a chain of broadcasting stations, the station was sending a program from that station to other stations.

Now, here, I believe that our situation is different than it is upon the mainland. It is 2,500 land miles approximately from here to the Pacific Coast. I do not believe, with a station of this kind, that it could or has engaged, with reference to its ordinary broadcasting band, and I am not talking about short-wave relay, in interstate commerce in that regard.

The complainants have not shown to this Court that this gross income tax of 2%, which everybody in the Territory pays, not only the radio stations but everybody else, is such a burden upon this station that would interfere with its operation. It does not lie in the same category as the Colorado Railroad case, wherein the short-line railroad or the railroad made a contract with the state to operate a short line within the state, and the Federal people said that that contract was no good because it would be a drain and a hindrance to the operation of the main railroad in interstate commerce.

Now, gentlemen, in general that is what the Court has found. Of course, there are these foreign programs, these foreign language programs, operating and they sold time on those.

The Court has gone over the proposed findings of fact that have been submitted here by Miss Lewis. I think I have covered them considerably, but in order that there can be no mistake, I think that those proposed findings of fact meet with the Court's approval, and if the Court has overlooked any of them in its oral decision they may be incorporated in the final decision as part of the Court's findings.

And the Court finds, in essence then, in favor of the Territory and against the complainants for the reasons here stated.

The prevailing party will submit a form of decision in conformity with the findings of the Court herein announced and may incorporate the oral decision of the Court by reference as it is reflected in the reporter's notes taken at this time.

The Court at this time wishes to thank both sides in this case for an able presentation of the case. I do not purport to be omnipotent. All I can say is, that another gentleman has said, a gentleman from the State of Washington, the Honorable Jeremiah Nederer, that I happen to be the judge to have the first opportunity to make a mistake.

All right, gentlemen. You may have your exception.

Mr. Ingman: We except to your Honor's ruling on the ground it is contrary to the law and the evidence and give notice of a motion for new trial and notice of an appeal.

And there is one exhibit here, your Honor, that we now have and we would like to substitute.

APPENDIX II.

Law No. 21340

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, TERRITORY OF HAWAII

AT TERM IN LAW

J. Elroy McCaw and John D. Keating,
Complainants,
v.
The Tax Commissioner of The Territory of Hawaii, Torkel Westly,
Defendant.

No. 21340

Action to Recover Excise Taxes Paid Under Protest

Filed in open court at 2:15 o'clock p.m., Jan. 28, 1952
R. A. Lynn, Clerk.

Rhoda V. Lewis, Esq.
Deputy Attorney General
Territory of Hawaii
Attorney for the Tax Commissioner

DECISION

This is an action by the complainants, J. Elroy McCaw and John D. Keating, to recover gross income taxes paid under protest, together with some interest and penalties. The tax law involved is chapter 101 of the Revised Laws of Hawaii 1945, as amended.

Complainants are a co-partnership, registered as such under the laws of the Territory of Hawaii, and they hold under said chapter 101 a license to engage in business; this license has been renewed annually to and including the year 1951. (Pursuant to section 5451.01, as amended, renewal for 1952 may be on or before January 31, 1952.)

The tax assessments concerned in this case involve the period to and including July 31, 1950. Complainants paid under protest part of the taxes demanded by the Tax Commissioner for this period. The Tax Commissioner, defendant herein, in addition to denying the allegations of the complaint, cross-complained for the balance of the taxes assessed by him for this period, together with penalties and interest. An oral motion to dismiss this counterclaim was made on January 14, 1952, and was denied on the ground that section 10476 of the Revised Laws of Hawaii 1945 is applicable.

The taxes involved in this case were levied against broadcast receipts of the aforesaid period. During this period complainants operated, and now operate, a radio broadcast station on a frequency of 630 kilocycles with 5000 watts of power. This station operates under the call letters KPOA, and commonly is so known. Complainants also operate, in connection with KPOA, a station in Hilo, but the Hilo station commenced operations subsequent to the period involved in the aforesaid assessments.

The business in which complainants are engaged is one which is controlled and regulated in a very great degree by the Federal Communications Commission under the Communications Act of 1934, Title 47, chapter 5, United States Code. It is the contention of the complainants that this field of endeavor has been preempted by the federal government to the exclusion of any state or territorial tax. It further is contended by the complainants that this radio station is engaged in interstate commerce, and that the territorial tax is a

burden upon interstate commerce and an undue interference therewith, and therefore void.

The Tax Commissioner, on behalf of the Territory, asserts that the federal statute and regulations embrace more than interstate communication (and from sections 3(e) and 301 of the Communications Act of 1934, 47 U.S.C. 153(e) and 301, this appears to be so); that the breadth of the field of regulation under the Communications Act of 1934 does not indicate that the states and the territories are excluded from all taxes in this wide field; that the pertinent question here is the extent to which KPOA is engaged in interstate communication and whether the taxed receipts are derived from interstate communication; that the facts show that the sole source of the taxed receipts is the transmission of KPOA broadcasts to the radio audience in the Territory, hence those receipts are from solely intrastate communication and may be taxed, and that no illegal burden on interstate commerce results from such a tax. The Tax Commissioner asserts the fact to be that KPOA's standard band broadcasts do not reach any radio audience outside the Territory with effective or satisfactory service that is of commercial significance, that only the receipts from short-wave relays are from interstate communication and those have not been taxed.

After trial of the case commencing January 3 to and including January 11, 1952, study of the memoranda which the parties submitted at the inception of the trial and authorities cited, and oral argument on January 14, 1952, the Court on January 15, 1952, rendered

its oral decision upholding the contentions of the Tax Commissioner; said oral decision, as reflected in the official reporter's notes, is incorporated herein by reference.

It has been held in a number of cases, upon which the complainants rely, that radio broadcasting, by its very nature, is interstate commerce for the reason that once the radio impulses or waves are put in motion there is no control over the extent of their transmission. But the pertinent question is: What is the area in which the KPOA broadcasts have commercial value? Save for 30% of its time which, under F.C.C. requirements, must be used for sustaining programs, the station may and does seek remuneration from sponsors of commercial programs and the like. So what we come down to is: What does this broadcast company make its money out of? The Court has concluded that, with the exception of the short-wave relays, KPOA makes its money with the Hawaiian audience in view and not the audience outside the Territory. As a result the receipts from these broadcasts may be taxed.

The receipts from railroads have been held taxable where obtained from the transportation of freight picked up at a point within the state and delivered to another point in the same state. In the case of a transcontinental railroad system the transcontinental hauls are tax exempt, but not the local business, although a railroad system is intricate in its nature. (See *Pacific Telephone and Telegraph Co. v. Tax Commissioner,* 297 U.S. 403.) So with the trucking business, it is where the trucking is solely of an interstate nature that the

states have been prohibited from taxing the proceeds. As to stevedoring, it has been held that when the cargo is put in the sling to put it on the ship that is the start of the interstate transportation and for that reason to tax the stevedoring receipts is an interference with interstate commerce.

Here as already stated the tax is on intrastate communication, and the complainants have not shown to this Court that this 2½% gross income tax, which everybody in the Territory pays, not only the radio stations but everybody else, is such a burden upon this station as to interfere with its operation. What complainants would have had to show can be ascertained by considering the Colorado Railroad case (271 U.S. 153), which was explained and held inapplicable in certain tax cases that were decided in *Pacific Telephone and Telegraph Co. v. Tax Commissioner, supra,* 297 U. S. 403.

The leading case as to radio broadcasting is the *Fisher's Blend* case (297 U.S. 650). In that particular case there was a stipulated set of facts that went to the Supreme Court, and which we must consider to be the basis of the decision. Under those facts the broadcasting there was not only interstate but international and the station received money for that sort of broadcasting. A radio station in Spokane, Washington, or Coeur d'Alene, Idaho, or El Paso, near the Mexican border, or Yuma, Arizona, near the California border, might be interstate. However, a station in Albuquerque, New Mexico, was held (51 N.M. 332 and 54 N.M. 133, 184 P. (2d) 416 and 215 P.(2d) 819) to have some broadcasts

that were directed only to a particular area within the state, though certain chain broadcasts and certain broadcasts of out-of-state media were held non-taxable.

If this station were so situated that the reception of its programs in another state or territory was sufficiently constant so as to be of commercial value, this Court without hesitation would find that this was an interstate enterprise. But it is situated in Honolulu, 2500 land miles from the Pacific coast. It is, under the regulations of the Federal Communications Commission (47 C.F.R. Chapter 1, Part 3) a Class III-A station, as set forth in Sec. 3.22 of the cited regulations (Exhibit 1). Attention also is called to section 3.30, paragraph (a), as to the place which a standard broadcast station is licensed to serve primarily, and paragraph (c) of the same section as to the location of the transmitter for the delivery of primary service to the place where the main studio is located. By the above cited regulations and the "Standards of Good Engineering Practice Concerning Standard Broadcast Stations" (Exhibits 1 and 2) the Federal Communications Commission has defined three service areas and has set standards for the determination of these service areas.

During the daytime hours KPOA does its broadcasting by means of the groundwave. The area in which the groundwave is not subject to objectionable interference or objectionable fading is, under the F.C.C. regulations and standards, above cited, the primary service area. A groundwave signal of half a millivolt per meter (.5 mv/m) generally will afford proper listening. KPOA has a groundwave signal of .5 mv/m or better through-

out the Hawaiian Islands, as shown on Exhibits 5a and 37, but with two major exceptions there shown. These exceptions are the northern part of Kauai, just back of the mountains that we know as Kokee, and the area (including the city of Hilo) south of the high mountains on the island of Hawaii. It is noteworthy that the evidence shows that KPOA has a connected station located in Hilo, and also shows another such instance in connection with another Hawaiian station.

Beyond the half-millivolt groundwave contour the possibilities of service by the groundwave depend on certain factors set forth in the F.C.C. standards, and as the signal grows less and less the question is whether the groundwave is rendering "intermittent service," the "intermittent service area" being defined by the F.C.C. as "the area receiving service from the groundwave but beyond the primary service area and subject to some interference and fading." Intermittent service depends upon a number of factors, but it is clear that when the groundwave signal is so weak it is drowned out by the noise level, that cannot be listenable. Upon all of the evidence (including the evidence as to reception on the battleship Iowa under the particular circumstances explained by the engineer called by the Territory) the Court has concluded that finding number 5, below set forth, is correct.

During hours of darkness a radio station can broadcast by the skywave. Under certain phenomena the skywave signal can be heard almost any place on earth. The area served by the skywave and not subject to objectionable interference is, by the F.C.C., called the

"secondary service area." Standards for "secondary service" are set forth by the F.C.C. in the "Standards of Good Engineering Practice" (Exhibit 2). It is not suggested that reception outside the Territory of the skywave signal of this Class III-A station meets those standards.

The evidence shows that reception of the skywave is not dependable, due to a number of factors. Letters received in evidence from persons reporting listening in distant places (commonly called "D-X" letters) have been considered. These were instances of reception outside the Territory by the skywave, but such reception outside the Territory is not sufficiently dependable for commercial purposes.

There have been introduced in evidence and the Court has considered advertisements of radio station coverage of stations in the continental United States and the Territory, including a brochure put out by this station. In no instance in the Territory has the advertised coverage gone beyond the territorial limits of the Territory of Hawaii.

There is evidence of a request made by the Tax Commissioner of the complainants to produce any sponsor who has purchased commercial time on KPOA with an end in view of sending advertising to any radio audience other than that located within the Territory of Hawaii. There has been no showing of any such purchase. A possible exception is the sale of radio time to Willie Saaga for a Samoan program (Exhibit L). The circumstances of this sale appear from the evidence. When the Tax Commissioner was preparing the assess-

ments no showing of this sale was made to him although KPOA was given an opportunity to make such showing; finding and conclusion number 10, below set forth, dispose of this matter.

There have been submitted by the Tax Commissioner proposed findings and conclusions, which include some of the matters above set forth and some additional matters. The Court finds and holds these to be in accordance with the law and the evidence; they are as follows:

1. In so far as places outside the Territory of Hawaii are concerned, KPOA's broadcasts on its standard band do not afford effective or satisfactory service that measures up to the standards for commercial coverage.

2. Time buyers do not buy time on KPOA as a medium of communication to an out-of-the-Territory audience.

3. Where a KPOA broadcast is directed to an out-of-the-Territory audience a shortwave relay is used, as in the case of the program "Hawaii Calls."

4. The tax has not been assessed on any receipts from broadcasts carried out of the Territory by shortwave relay or brought into the Territory by shortwave relay.

5. During daylight hours enjoyable listening to the KPOA standard band broadcasts is impossible at places outside the Territory, and is limited to ships or planes that happen to be within range.

6. During hours of darkness reception of KPOA's standard band broadcasts outside the Territory is too

unreliable and irregular for such reception to have commercial value.

7. KPOA has a "foreign language department" which is offered by it as a service to advertisers. This department conducts, each broadcast day, a substantial number of hours of broadcasts in Japanese and in a Filipino dialect. These broadcasts are scheduled by the station each day on a participating basis, that is, the station puts on the foreign language programs and sponsors buy spot announcements on the programs.

8. A large number of KPOA time buyers have no desire or occasion to reach any audience outside the Territory, even if effective and satisfactory service were offered.

9. The radio audience outside the Territory of Hawaii is not a factor in the selling or buying of radio time on station KPOA, where no shortwave relay is employed.

10. The sale of radio time to Willie Saaga, shown by plaintiffs' Exhibit L, is an exceptional instance, and the Tax Commissioner was not obliged to take notice of this exceptional instance unless it was called to his attention. Before the tax assessments were made KPOA was given an opportunity to make such showing but did not do so and is not now entitled to a deduction for this sale.

11. The Territorial tax law has been and is properly interpreted and applied by the Tax Commissioner and the tax law and assessments made thereunder are valid.

12. The plaintiffs are not entitled to recover the taxes

paid under protest and the Tax Commissioner is entitled to judgment on his counterclaim.

In accordance with the foregoing the Court finds that the sum of $7,637.33 paid under protest by the complainants to the Tax Commissioner is a lawful government realization and that the complainants are not entitled to recover the same, and in addition thereto the Tax Commissioner, on behalf of the Territory, is entitled to recover of the complainants the further sum of $14,595.98 together with additional interest accrued from the first day of April, 1951, to and including the 31st day of January, 1952, in the amount of $96.98 for each month, or fraction thereof, and the costs herein incurred. A judgment in accordance herewith will be signed on presentation.

DATED at Honolulu, T. H., this 28th day of January, 1952.

WILLSON C. MOORE
Judge of the Above Entitled Court.

J. ELROY MCCAW and JOHN D. KEATING, Complainants herein, do hereby except to the foregoing Decision.

J. ELROY MCCAW and JOHN D. KEATING, *Complainants,*
By DAVID N. INGMAN, KENNETH DAVIS, JUSTIN MILLER and VINCENT T. WASILEWSKI, *Their Attorneys,*
By DAVID N. INGMAN

EXCEPTION ALLOWED this 28th day of January, 1952.

S/ WILLSON C. MOORE (Seal)
Judge of the Above Entitled Court.

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in this office, in full force and effect this 17th day of April, 1952. AMY E. NUTTALL, *Clerk, Circuit Court, First Circuit, Territory of Hawaii.*